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Supreme Court of the United States

OCTOBER TERM, 1949

ATLANTIC COAST LINE RAILROAD COMPANY and the DEPOSIT COMMITTEE for First and Refunding Mortgage 5% Bonds of Florida East Coast Railway Company due 1974,

Petitioners,

vs.

ST. JOE PAPER COMPANY, ET AL.,

Respondents.

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(1) PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

(2) MOTION TO DISPENSE WITH THE PRINTING OF THOSE PORTIONS OF THE RECORD CERTIFIED BY THE DISTRICT COURT TO THE COURT OF APPEALS WHICH WERE NOT PRINTED IN THE COURT OF APPEALS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Atlantic Coast Line Railroad Company and the Deposit Committee for First and Refunding Mortgage 5% Bonds of Florida East Coast Railway Company due 1974 respectfully pray that a writ of certiorari issue to review an order entered in the United States Court of Appeals for the Fifth Circuit on January 17, 1950, affirming an order of the District Court for the Southern District of Florida which disapproved a plan of reorganization of the Florida East Coast Railway Company, a debtor in a Section 77 proceeding, which had been certified to the District Court by the Interstate Commerce Commission.

Judges HUTCHESON and RUSSELL voted to affirm the order; Judge HOLMES dissented.

The Plan provides for a merger or consolidation of Florida East Coast Railway Company and Atlantic Coast Line Railroad Company, or a transfer of the properties of the former to the latter, cash and securities of Atlantic Coast Line Railroad Company to be distributed to creditors of Florida East Coast Railway Company. For that reason, and as an unsecured creditor of Florida East Coast Railway Company, Atlantic Coast Line Railroad Company is aggrieved by the order of the Court of Appeals.

The Deposit Committee represents a large number of holders of Florida East Coast Railway Company First and Refunding Mortgage Bonds having small holdings.

The questions are of public importance in connection with railroad reorganizations because they involve the functions of the Interstate Commerce Commission and the Courts in Section 77 proceedings. The order of the Court of Appeals is in conflict with applicable decisions of this Court, particularly *Ecker* v. *Western Pacific R. Corp.* (1943) 318 U. S. 448, *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.* (1943) 318 U. S. 523 and *Reconstruction Finance Corpora-*

tion v. *Denver & Rio Grande Western R. Co.* (1946) 328 U. S. 495. It is also in conflict with decisions of other Courts of Appeals, including particularly *Old Colony Bondholders* v. *New York, New Haven & H. R. R. Co.* (1947) 161 F. (2d) 413, cert. den. *Protective Committee for Bonds of Old Colony Railroad Co.* v. *New York, New Haven & H. R. R. Co.* (1947) 331 U. S. 858, rehearing denied (1947) 332 U. S. 803.[1]

OPINIONS BELOW

The opinions in the Court of Appeals are not yet reported.

The opinion of the District Court is reported at 81 F. Supp. 926.

The reports of the Interstate Commerce Commission are at 252 I. C. C. 423 and 731, 254 I. C. C. 865, 261 I. C. C. 151 and 267 I. C. C. 295 and 729.

JURISDICTION

The decree of the Court of Appeals was entered on January 17, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

The questions presented, all of which are interrelated and involve the functions of the Interstate Commerce Commission and the Courts under Section 77 of the Bankruptcy Act, are as follows:

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[1] Also *Brooks* v. *St. Louis-San Francisco Railway Company* (C. C. A. 8th, 1946) 153 F. (2d) 312, cert. den. *Brooks, Administrator* v. *St. Louis-San Francisco Railway Co.* (1946) 328 U. S. 867, rehearing denied (1946) 329 U. S. 820.

Chicago Rock Island & Pacific Railway Company v. *Fleming* (C. C. A. 7th, 1946), 157 F. (2d) 241, cert. den. *Chicago, Rock Island & Pacific Railway Co.* v. *Fleming* (1946) 329 U. S. 780, *Harrison* v. *Fleming* (1946) 329 U. S. 780, *Axelrod* v. *Fleming* (1946) 329 U. S. 811.

St. Louis Southwestern Railway Company v. *Henwood* (C. C. A. 8th, 1946) 157 F. (2d) 337, 351, cert. den. *Southern Pacific Co.* v. *Henwood, Trustee* (1947) 330 U. S. 836, and rehearing denied *Meyer* v. *Henwood, Trustee* (1947) 331 U. S. 870.

(1) Whether, if the Commission has

(i) followed the statutory mandates,

(ii) found that the cash and securities receivable by a class of creditors under a plan constitute the "equitable equivalent of the rights of these creditors in and to the property of the debtor", and

(iii) had material evidence to support that finding and its conclusion that the plan meets with the requirements of sub-sections (b) and (e) of Section 77,

the District Court or the Court of Appeals may nevertheless disapprove the plan on the ground that it is not "fair and equitable" and "does not afford due recognition to the rights of each class of creditors and stockholders" even while conceding that there is no issue with respect to the relative treatment of the different classes and hence no problem as to compliance with the "absolute priority" rule.

(2) Whether in order to approve a plan certified by the Interstate Commerce Commission the District Court must be independently "satisfied", in the colloquial or subjective sense, that the plan is "fair and equitable" and "affords due recognition to the rights of each class of creditors and stockholders".

(3) Whether under the circumstances set forth in (1) the District Court or Court of Appeals may disapprove a plan on the ground that the Commission overemphasized or was preoccupied with the public interest and consequently subordinated "the primary question of the legal and equitable rights of the bondholders as such", without indicating that any such overemphasis or preoccupation prevented the Commission from meeting the requirements referred to in (i), (ii) and (iii) of (1) above.

(4) Whether, in determining whether or not a plan certified by the Commission should be approved, the District Court or Court of Appeals should be influenced (and if so, to what extent) by the opposition of members of a class of creditors.

(5) Whether it is consistent with this Court's ruling in the *Western Pacific* case (318 U. S., p. 468) that "§ 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the Court" for the District Court or the Court of Appeals to rule that a plan for a merger[1] of a debtor with another railroad corporation, which is authorized by Section 77 (b) and approved by the Commission, "ought to be a last resort".

(6) Whether the following statement in the opinion of the District Court affords a basis for the disapproval of a plan certified by the Commission:

> "• • • I am impressed that evidence produced before me, if it had been before the Commission, might have produced a different result. The materials for some of it already existed, but were not assembled for or considered by the Commission, and some relate to occurrences since it made its finding".

no distinction being made between (i) evidence relating to conditions existing prior to or at the time of the Commission's Report and (ii) evidence relating to alleged changes in conditions subsequent to the Commission's Report.

(7) Whether such a statement as that quoted in (6) constitutes a finding to which Rule 52 (a) of the Federal Rules of Civil Procedure applies.

(8) Whether, particularly in view of the provisions of Section 3 (a) (3) of the Mahaffie Act, approved April 9, 1948 (62 Stat. 162, 167-168),[2] the District Court or the Court of Appeals may disapprove a plan certified to the District Court by the Interstate Commerce Commission on April 5, 1948 on the ground that there have been "any changes, facts or developments which have occurred since December 31, 1939."

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[1] Throughout we use the term "merger" to denote a merger, a consolidation or a unification by transfer or conveyance. The Plan authorized the Court to utilize any one of these three methods of unification (267 I. C. C. 748).

[2] Appendix, p. v-vi.

(9) Whether this Court may direct the approval of the Plan certified by the Interstate Commerce Commission notwithstanding disapproval of such Plan by the District Court and affirmance by the Court of Appeals.

STATUTES INVOLVED

The pertinent provisions of Section 77 and of the Mahaffie Act are copied in the Appendix.

STATEMENT OF THE CASE

Preliminary: Copies of the Reports of the Interstate Commerce Commission of January 8, 1945, April 8, 1947 and March 25, 1948 (261 I. C. C. 151, 267 I. C. C. 295, 267 I. C. C. 729), to which we will refer, will be found in the forepart of Volume I of the Record.

The opinion handed down by Circuit Judge SIBLEY as U. S. Judge Designate in the District Court,[1] which was adopted by Judge RUSSELL in the Court of Appeals, will be found in Vol. II of the Record at p. 466-481.

The Debtor: The Florida East Coast Railway Company has a principal line between Jacksonville and Miami and other branches or extensions. It has outstanding (1) equipment obligations, (2) First Mortgage 4½% Bonds, (3) First and Refunding Mortgage 5% Bonds, (4) unsecured debts and (5) capital stock.

The Atlantic Coast Line Railroad Company: The railroad lines of the Atlantic Coast Line include a double-tracked main line from Richmond, Virginia, to Jacksonville and main lines extending from Jacksonville to Montgomery, Birmingham, Atlanta and Tampa. The Coast Line has long had close relations with the Florida East Coast, whose main line from Jacksonville to Miami is geographically an extension of the Coast Line. Of the East Coast's interchange at Jacksonville, almost 100% of

[1] Designated to hold the District Court because of the illness of Judge STRUM (R. 6).

the passenger interchange and about 50% of the freight interchange are with the Coast Line (267 I. C. C. 310-312).

Judge HUTCHESON's opinion inadvertently assumes that the Atlantic Coast Line has a main line "extending from Jacksonville to Miami" (R. 942) and refers to the Atlantic Coast Line as a "railroad company coveting, and pressing to possess, a competing debtor railroad company". The Atlantic Coast Line has no line from Jacksonville to Miami and the Commission found that the two railroads are "practically noncompetitive" (267 I. C. C. 311). They are connecting roads, not competitors.[1]

The Deposit Committee: Before the District Court the Deposit Committee was the authorized spokesman for 260 bondholders (R. 321). As the 260 bondholders held only $572,400 of Bonds, the Committee is referred to in Judge HUTCHESON's opinion as the Atlantic Coast Line's "small but faithful ally" (R. 939) and again as the Coast Line's "small but earnest ally" (R. 942). As is clearly shown by the record (R. 345-375), the Deposit Committee is supporting the Plan only because it believes it to be the best available plan for the many small bondholders whom it represents. Its sole interest in the case is to obtain the best possible treatment for those bondholders.

Proceedings Prior to July 20, 1945: The Florida East Coast was in equity receivership from August 31, 1931 to January 25, 1941, when the reorganization proceeding under Section 77 was instituted. In 1942 the Commission approved a plan of reorganization (R. 529-689), but war earnings resulted in such a large "unallocated cash surplus" that on motion of all of the parties District Judge STRUM remanded the plan to the Interstate Commerce Commission (R. 690-697).

After further proceedings, on January 8, 1945 the Commission approved a plan for an independent or in-

[1] The paragraph in Judge HUTCHESON's opinion about the Atlantic Coast Line was taken largely from a paragraph in the Atlantic Coast Line's brief but the name *Miami* was inadvertently substituted for the name *Montgomery*.

ternal reorganization (261 I. C. C. 151-193). After considering petitions for modifications and hearing oral argument, on July 20, 1945 the Commission reopened the proceedings to receive evidence with respect to the modification of the plan of January 8, 1945 "and for the proposal of other plans" (267 I. C. C. 295-296).

Proceedings Between the Reopening of the Case on July 20, 1945 and the Certification of the Plan on April 5, 1948: After the reopening of the record the Atlantic Coast Line proposed a plan of reorganization (267 I. C. C. 297-298). The Commission found that the Coast Line's proposal was inadequate and required more favorable treatment for the bondholders (267 I. C. C. 349-356); the Commission's Plan thus differs materially from that proposed by the Coast Line (267 I. C. C. 374-379). Judge SIBLEY's statement that the Atlantic Coast Line "proposed it", meaning the Commission's Plan (R. 470), is incorrect, as is also Judge HUTCHESON's reference to the Atlantic Coast Line as "the proposer of the plan" (R. 939).

Commission hearings were held consuming substantially the entire month of November, 1945, as a result of which 3,057 pages of transcript were added to the prior 1,445 pages. At the hearing and by an order of the Commission entered on June 27, 1946, no less than 214 exhibits were added to the 89 which had previously been introduced in the record.

On July 20, 1946 Commission Examiner R. H. Jewell issued a proposed report recommending a plan for an internal reorganization similar to that approved by the Commission on January 8, 1945 (R. 730-848). After considering exceptions to the proposed report and briefs and hearing two full days of oral argument in October, 1946, the Commission under date of April 8, 1947 issued a report and order approving the Plan for a merger with the Atlantic Coast Line which the Court later disapproved.

After the Commission had considered petitions for reargument and supporting briefs, a reargument took place

in January, 1948, two and one-half days being devoted to it.

On the reargument it was stipulated that the Commission might consider the earnings reports of the two railroads up to the date the Plan was certified to the Court. Hence the Commission had before it the most recent earnings of the two railroads (267 I. C. C. 738-740).

On March 25, 1948 the Commission issued a report denying the petitions for modifications by a vote of six to five (267 I. C. C. 729-747).

The first and most vigorously developed ground for the minority dissents to the Commission's two reports was that the Plan violated the "absolute priority" rule (267 I. C. C. 390-391, 745-747). The dissents reflect a complete misconception of the "absolute priority" rule; as Judge HOLMES pointed out (R. 951), none of the four Judges has agreed that the Plan violates the rule or even that any question involving the priority rule is presented.

The Commission's Plan: The Plan certified by the Commission and disapproved by the Court provides for the assumption of the Debtor's equipment obligations (267 I. C. C. 749) and for the payment of the First Mortgage Bonds in cash (267 I. C. C. 756). The capital stock was held to be without value and no objection was made to the holding (267 I. C. C. 756). Consequently everything distributable under the Plan would go to the holders of the First and Refunding Mortgage Bonds, except what may be distributed to the holders of unsecured claims in respect of the unmortgaged assets.[1]

The Plan provides that

1. All "excess cash" in the estate, as defined in the

[1] There are substantial unmortgaged assets. While the Commission was inclined to the view that all of the assets were subject to the First and Refunding Mortgage, it recognized that the Court might hold that there were unmortgaged assets and accordingly included in the Plan a flexible provision to cover that contingency (267 I. C. C. 365-372, 756). The District Court later held that the principal disputed items referred to in the Commission's Report (267 I. C. C. 366) and certain other items were unmortgaged. An appeal and cross-appeals were taken from the Order but they have been dismissed on consent and the Court's determination that there are substantial unmortgaged assets has therefore become final.

Plan, shall be distributed to the holders of the First and Refunding Mortgage Bonds (267 I. C. C. 749).

2. All of the balance of the estate, including the railroad, shall be vested in the Atlantic Coast Line Railroad Company by merger, consolidation or transfer, in exchange for cash to be paid by the Atlantic Coast Line and securities to be issued by the Atlantic Coast Line (267 I. C. C. 748, 750-754).[1]

The Commission's Findings: The Commission's findings covered all issues:

The Public Interest

The Commission's findings related to both (1) the advantages of a merger plan as compared with any plan for an internal reorganization and (2) the disadvantages of an internal plan which would result in control by the St. Joe Paper Company.

As to the advantages of a merger plan, the Commission found that such a plan would result in

(1) "greater financial stability" (267 I. C. C. 339-343, 389), a factor of first importance in determining the fate of a railroad which has been in the hands of the Courts since 1931;

(2) important economies of operation (267 I. C. C. 322-325, 388), also a factor of great importance at a time when the railroads have to face rising costs and serious competition from other forms of transportation; and

(3) betterment of service (267 I. C. C. 318-322, 327-328, 388).

Much of the large record before the Commission and considerable portions of its Report of April 8, 1947 were

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[1]

Cash	$ 4,125,000
Divisional First Mortgage fixed interest 3½% Bonds	13,500,000
Divisional Second Mortgage Income 4¼% Bonds	7,875,000
Participating Cumulative 4% Preferred Stock	9,000,000
Common Stock (stated at $100 per share)	6,000,000
Total	$40,500,000

devoted to these subjects. They were dismissed by Judge SIBLEY with the following statement (R. 468):

> "After a very lengthy discussion the Commission concluded in general terms that there would be betterment of service and economies of operation and increased financial stability by the merger with the Coast Line, and more experience and less distraction by other interests, than if St. Joe Paper Company controlled; * * *"

Judge HUTCHESON's opinion contains no hint that the Commission found that there would be any advantages from a merger plan.

As to the disadvantage of control of an independently reorganized Florida East Coast by the St. Joe Paper Company, the Commission found that such a control would not be compatible with the public interest (267 I. C. C. 389).[1] Judge SIBLEY and the three Judges who heard the case in the Court of Appeals all accepted the Commission's finding on this point as binding.

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[1] The basis for that finding is the record with respect to the St. Joe Paper Company (267 I. C. C. 313-316, 343-347). It is an operating-holding company controlled by the charitable Trust created under the will of Alfred I. du Pont. The St. Joe Paper Company or the charitable du Pont Trust either separately or together control the Florida National Group of twenty-one banks (R. 438); two important industrial enterprises, the St. Joe Paper Company (267 I. C. C. 314) and Herring-Hall-Marvin Safe Company (R. 445); Union Terminal Warehouse Company at Jacksonville, Florida's largest warehouse (267 I. C. C. 345); Appalachicola Northern Railroad Company; St. Joseph Dock and Terminal Company; St. Joseph Telephone and Telegraph Company; the Alfred I. du Pont Building in Miami; real estate, some improved and some unimproved, on the East Coast of Florida, worth many millions of dollars; and more than 470,000 acres in northwest Florida.

In so holding the Commission followed the policy which it had laid down in *Proposed Construction of Lines by Piedmont & Northern Railway Company* (1928) 138 I. C. C. 363. (See majority opinion at p. 401 and occurring opinion of Commissioner Eastman at p. 402). At the time when the Commission's reports were handed down, this Court's decision in *United States* v. *Elgin, Joliet & Eastern Railroad Company* (1936) 298 U. S. 492 created some uncertainty whether the "commodities clause" of the Interstate Commerce Act indicated any Congressional policy against the common control of a carrier and a shipper, as distinguished from control by a carrier of a shipper. The opinions in *United States* v. *South Buffalo Railway Company* (1948) 333 U. S. 771 would seem to eliminate any doubt as to the policy intended to be implemented by the commodities clause, even though the scope and effect of that clause remains limited because of the application of the rule of *stare decisis*.

Private Interests

As already noted, the Commission disapproved the plan proposed by Atlantic Coast Line as inadequate and required the substantially more favorable terms for the Florida East Coast bondholders which are now embodied in the Plan.

In its Report of April 8, 1947 the Commission considered the factors bearing on the valuation of the debtor's property, in terms of Atlantic Coast Line securities, in great detail.[1] The comprehensiveness of the Commission's consideration of the treatment of the bondholders is important, because one of the grounds, discussed below (p. 23-26), that Judge HUTCHESON gave for the affirmance of the order disapproving the Plan was that the Commission had been too preoccupied with matters of the public interest.

With respect to the Plan it found (267 I. C. C. 379):

> "We find that the above securities and cash payment of the Coast Line, together with any other cash distributable to the first and refunding bondholders of the debtor's estate, will constitute, in view of the greater stability of earnings in the future, which

[1] The Report of April 18, 1947 contains a description of the Coast Line plan (267 I. C. C. 297-298); a description of the Atlantic Coast Line and its intercorporate relationships (p. 310-313); a section entitled *"Prospective savings from unification"* (p. 322-325); another entitled *"Future financial stability of the debtor"* (p. 339-343); a series of parts entitled "FAIRNESS OF THE COAST LINE PLAN", "EFFECTIVE DATE", "PROPOSALS AND CONCLUSIONS WITH RESPECT TO AN INCREASE IN VALUATION OF THE DEBTOR'S PROPERTY", "MANDATORY DISTRIBUTION OF AVAILABLE CASH" and "CASH RESERVES", (p. 349-365), all of which deal primarily with the treatment of the bondholders; another part entitled "PROVISIONS OF PLAN APPROVED" (p. 372-379), which deals almost exclusively with the treatment of the bondholders; succeeding sections largely technical but directly affecting the bondholders (p. 379-387); and the "SUMMARY OF FINDINGS" *and* "CONCLUSIONS" (p. 387-390). Of the 16 pages in the Report of March 25, 1948 approximately nine full pages deal with the treatment of the bondholders (267 I. C. C. 735-744).

Moreover, the factual bases for the Commissions' judgment as to the "equitable equivalence" of the exchange provided for in the Plan included not merely what was specifically referred to in the Reports of April 8, 1947 and March 25, 1948; they included many factors referred to in the Report of January 8, 1945, particularly the parts headed "AMOUNT OF CAPITALIZATION", "CASH RESOURCES AND PROBABLE CASH REQUIREMENTS", "EFFECTIVE DATE" and "NEW CAPITAL STRUCTURE" (261 I. C. C. 158-172). Of course many of the figures referred to in the Report of January 8, 1945 were out of date by April 8, 1947 or March 25, 1948, but other figures or facts, or expressions of judgment by the Commission in the Report of January 8, 1945, continued to be pertinent.

> should be realized in the unified properties under Coast Line control as compared with independent management, the equitable equivalent of the rights of these creditors in and to the property of the debtor."

The briefs filed on the reargument, and the reargument itself, dealt fully with the question of the treatment of the holders of the First and Refunding Mortgage Bonds. As already stated, it was stipulated that the Commission might consider the latest available earnings records of the two roads and it did so (267 I. C. C. 738-740). The Commission affirmed the findings which it had made on April 8, 1947 (267 I. C. C. 744-745).

The Commission indicated that it was particularly impressed by a test showing how the Plan and the alternative internal plan would have worked out during the 12 months ended October 31, 1947, the latest period for which figures were available, saying (267 I. C. C. 740-741):

> "The result showed, without taking into consideration the cash payment of $4,125,000 to be made by the Coast Line under the approved merger plan, more favorable treatment of present first and refunding bondholders under the approved merger plan in annual return per distributive share."[1]

Objections to the Plan and Evidence in the District Court: On behalf of the bondholders objections to the Plan were filed by the following:

The St. Joe Paper Company, which with the Alfred I. duPont Trust holds $25,000,000 of the First and Refunding Mortgage Bonds. The supporters of the Plan contend that the objection is due to a desire to add the Florida East Coast Railway Company to the other enterprises of the duPont Trust,[2] regardless of the interests of the national

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[1] The test referred to by the Commission will be found in Schedule C2 to A. C. L. Exhibit No. 18 in Volume II of the record; a similar test introduced in the District Court covering the 12 months ended October 31, 1948 is A. C. L. Exhibit No. 20.

[2] See above, p. 10, Note 1.

transportation system and of the bondholders as a class, in order to benefit the objectors' other enterprises and extend their power.

The Claughton Group, holding about $3,500,000 of Bonds.[1] Claughton himself, the largest holder in the Group, had $2,599,000 of Bonds pledged to one of the Florida National Group of banks controlled by the St. Joe Paper Company (R. 300) and all of the other members of the Claughton Group have, or have had, similar pledges (R. 297-301, 442-444).

The Conn Group, holding $1,008,500 of Bonds. Mr. Conn is an ardent believer in a "debt-free" reorganization (R. 383-385), which the Commission declined to approve long before there was any plan for a merger with the Atlantic Coast Line (261 I. C. C. 170-171).

The Lynch interests, holders of about $3,000,000 of Bonds, have opposed every plan except one they themselves proposed. With respect to the plan for an internal reorganization which the Commission approved on January 8, 1945 they said: "This is the harshest plan of reorganization that has been called to our attention".[2]

The Mortgage Trustees: The Mortgage Trustees were appointed by the St. Joe Paper Company and they opposed the Plan despite studies made by their own statisticians which indicated that the Plan was more favorable than an internal plan (R. 376-377), principally on the ground that "the Trustee is ordinarily persuaded, and should be, by a large majority of its bondholders" (R. 379).

Throughout the proceedings in the Courts below the petitioners contended that the objections that the Plan is not "fair and equitable" bear no relation to the statutory tests under Section 77 and that the objections of the St. Joe

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[1] In the Record the Claughton Group is referred to as "W. G. Welbon, et al." (R. 43-78, 297-319).

[2] See petition for modification, p. 3, included in Item 5 of A. C. L.: Designation, Vol. II, p. 493.

Paper Company, the Claughton Group and the Conn Group have been based on considerations not common to the bondholders as a class.

The Deposit Committee, representing 260 holders of $572,400 of Bonds, supported the Plan. An expert for the Deposit Committee testified in the District Court, in explanation of the position of that Committee, that the Plan provided substantially more favorable treatment than could be obtained through an internal plan (R. 345-375; Deposit Committee's Exhibits 1-6). Judge SIBLEY apparently did not disagree with the expert's judgment but discarded the evidence on the ground that the Committee and its "clients are not interested in being stockholders or helping to run the railroad" (R. 470).

The holders of the remaining $10,919,100 of Bonds were not represented.

Considerable other evidence was taken in the District Court, some of which will be referred to briefly below.

The Opinions in the District Court and Court of Appeals: Judge SIBLEY disapproved the Plan on three grounds, summarized in the first footnote to Judge HUTCHESON's opinion (R. 938) as follows:

> "(1) That the provision of the plan for a forced merger with Atlantic Coast Line, over the objection of an overwhelming majority of the bondholders of the debtor, was not in accordance with statutory provisions and, therefore, beyond the power of the Commission to propose and approve.
>
> "(2) That if wrong in this and the proposed plan is a lawful one, the court should not approve it because it is clear that if it is approved, all of the opponents of it will oppose its confirmation, and since the objectors are reasonably justified in objecting to it and are not merely obstructors, and the court ought not to, and would not, confirm it over their objections, approval of it now would be in vain.

"(3) That the plan is not fair and equitable and does not afford due recognition to the rights of refunding bondholders."

Although Judge RUSSELL adopted all three of Judge SIBLEY's grounds for disapproval of the Plan, the third ground was the sole basis for the affirmance of Judge SIBLEY's order, since Judge HOLMES disagreed with Judge SIBLEY on all three grounds (R. 950-954) and Judge HUTCHESON agreed with Judge SIBLEY only as to the third ground (R. 945-946). As to the first ground, Judge HUTCHESON expressed definite disagreement with Judge SIBLEY (R. 946-948).[1] As to the second, Judge HUTCHESON agreed with the appellants that Judge SIBLEY's holding was "an anticipatory ruling on a matter not then before him" and limited himself to saying that under the circumstances there was "nothing seriously amiss in his action in ruling anticipatorily as he did" (R. 948).

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[1] Judge SIBLEY clearly ruled that the mere fact that a majority in amount of the holders of the First and Refunding Mortgage Bonds opposed the Plan made it *per se* unlawful (R. 475-476), although his discussion of the point contained comments which were not directly relevant. The basis given for the ruling was the "history of the legislation", which was the subject of extensive discussion in the briefs in the Court of Appeals.

Judge HUTCHESON said (R. 946-947):

> "With the first reason, as broadly put by the trial judge, that, because the plan provided, over the objection of the bondholders, for merging the debtor with Coast Line, without having the properties put up for sale, it would not be lawful under the statute, we cannot agree.
>
> * * * *
>
> "We are in no doubt, however, that a plan providing for what the trial judge broadly called a 'forced merger', that is, a merger over the objection of the debtor and all its creditors, might be lawfully certified to the court and lawfully approved and confirmed by it."

He later said (R. 948):

> "We agree with the trial judge that upon the facts of record and his findings, and in the light of this determination of the commission, such a forced merger as is now proposed is contrary to the statute."

It is clear that Judge HUTCHESON used the words "such a forced merger as is now proposed" as a means of expressing an over-all judgment that the Plan was not "fair and equitable" in the colloquial sense and did not intend to modify his previously expressed opinion that a merger plan could be approved and confirmed "over the objection of the debtor and all its creditors".

REASONS FOR GRANTING THE WRIT

QUESTIONS (1) AND (2)

The Functions of the Commission and the Courts With Respect to the Treatment of Creditors Under a Plan

In *Palmer* v. *Massachusetts* (1939) 308 U. S. 79, *Ecker* v. *Western Pacific R. Corp.* (1943) 318 U. S. 448, *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.* (1943) 318 U. S. 523, *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western R. Co.* (1946) 328 U. S. 495, *Insurance Group Committee* v. *Denver & Rio Grande Western R. Co.* (1947) 329 U. S. 607 and *Callaway* v. *Benton* (1949) 336 U. S. 132, this Court has defined the powers of the Commission and the Courts in Section 77 proceedings. The *Western Pacific, Milwaukee* and *Denver* cases have, in particular, marked out their respective responsibilities in connection with the approval and confirmation of plans of reorganization.

The *Western Pacific* and *Milwaukee* cases in 1943 were generally accepted as eliminating the dark fog of uncertainty over the respective functions of the Commission and the Courts in connection with approval of the plans, and the first *Denver* case in 1946 was similarly accepted as removing the threat of a "blockade" in connection with the confirmation of plans. This Court's opinions made Section 77 workable; confirmed the intent of Congress to give the Commission "leadership" in connection with plans of reorganization involving both the public interest and private interests and to limit the participation of the Courts to the discharge of essentially judicial functions; and cleared the way for the completion of plans for railroads having a large portion of the mileage of the country.

The holdings in the *Western Pacific* and *Milwaukee* cases were summarized in the first *Denver* case (328 U. S. 509):

> "To the courts, Congress confided the power to review the plan to determine whether the Commission

> has followed the statutory mandates of subsection (e), 318 U. S. at 477, and whether the Commission had material evidence to support its conclusions. 318 U. S. at 477; concurring opinion at 512."

With respect to the treatment of creditors Justice REED's opinion in the *Western Pacific* case said (318 U. S. 472):

> "Valuation is a function limited to the Commission, without the necessity of approval by the court. The first sentence of the last paragraph of subsection (e) provides:
>
> > " 'If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan.'
>
> The function of valuation thus left to the Commission is the determination of the worth of the property valued, whether stated in dollars, in securities or otherwise."

Justice DOUGLAS's opinion in the *Milwaukee* case said (318 U. S. 565-566):

> "It is sufficient that each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered. That requires a comparison of the new securities allotted to him with the old securities which he exchanges to determine whether the new are the equitable equivalent of the old."

The Commission culminated its extensive discussion of the treatment of the creditors with the following finding (267 I. C. C. 379):

> "We find that the above securities and cash payment of the Coast Line, together with any other cash distributable to the first and refunding bondholders of the debtor's estate, will constitute, in view of the greater stability of earnings in the future, which should be realized in the unified properties under

> Coast Line control as compared with independent management, the equitable equivalent of the rights of these creditors in and to the property of the debtor."

It also made a finding in the express terms of subsection (d) of Section 77 that "the plan as thus modified will meet the requirements of section 77 (b) and (e) of the above act" (267 I. C. C. 390).

There could be no issue with respect to the relative treatment of the different classes of creditors and hence no problem as to compliance with the "absolute priority" rule: the First Mortgage Bonds would be paid in cash and no objection to their payment has been made; the participation of the unsecured creditors is based exclusively on their interest in unmortgaged assets and is clearly proper (*Milwaukee* case, 318 U. S. p. 569); and the stockholders do not object to their exclusion from participation. As Judge HOLMES pointed out (R. 951), neither the District Court nor the Court of Appeals held that the Plan violated the "absolute priority" rule.

The opinion of Judge SIBLEY, which was adopted by Judge RUSSELL, reflects a reluctance to accept this Court's delineation of the functions of the Commission and the courts. Judge SIBLEY said (R. 474):

> "And on the matters about which the statute says the judge must be satisfied in order to approve a plan or confirm it over rejection, he has the right to make his independent investigation and is not bound by the conclusions of the Commission thereon. That the judge is not restricted to the facts certified by the Commission but may take additional evidence, is shown by the requirement that if the matter is sent back to the Commission a copy of the additional evidence shall be sent to the Commission. What is fair and equitable and what gives due recognition to the rights of each class of creditors and stockholders, and what is the law of the land, are matters of a judicial nature and within the peculiar expertness of the courts. On them the judge has the last word."

Under this Court's decisions the Commission's finding of value (in terms of Atlantic Coast Line cash and securities) established the adequacy of the consideration to be provided under the Plan for the Debtor's property. If that finding was not vulnerable, and if there was no violation of the "absolute priority" rule, there was no basis for the disapproval of the Plan by the Court.[1]

However, Judge SIBLEY construed the mere reference in the first sentence of the second paragraph of subsection (e) to "any evidence received"[2] in the Court as giving the Court discretionary authority to receive evidence on any subject and to conduct an "independent investigation" to determine whether the Court should be "satisfied",[3] in the colloquial or subjective sense, that the Plan was "fair and equitable". Judge SIBLEY applied the test of "colloquial equity" as determined by the Court—a test rejected by this Court in *Securities and Exchange Commission* v. *Central-Illinois Securities Corporation* (1949) 338 U. S. 96, in construing Section 11(e) of the Public Utility Holding Company Act of 1935 despite the absence of any provision in that Act similar to the valuation paragraph in subsection (e) of Section 77.[4]

During the course of the hearing in the District Court Judge SIBLEY indicated that the Commission's function is similar to that of a Special Master and that, so far as the private interests are concerned, the effect to be given to a report of the Commission "does not vary substantially from the effect given a master's report" (R. 168-169). Despite some indication in Judge SIBLEY's opinion of formal deference to the Commission's findings, the opinion as a whole leaves no doubt that he considered the Commis-

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[1] See, in addition to the cases already cited, *Case* v. *Los Angeles Lumber Products Co.* (1939) 308 U. S. 106, 115-119; and *Securities and Exchange Commission* v. *United States Realty and Improvement Co.* (1940) 310 U. S. 434, 452.

[2] See p. iv of Appendix.

[3] See p. iii of Appendix.

[4] See p. iv-v of Appendix.

sion's responsibilities with respect to the treatment of the bondholders analogous to that of a Special Master.

To some extent Judge HUTCHESON left his conception of the respective functions of the Commission and the Courts to inference, but the inference to be drawn from his opinion is clear. Referring to the appellants' contentions, stated below as we have just stated them here, Judge HUTCHESON said (R. 940):

> "Appellants citing the *Western Pacific*, the *Milwaukee*, and the *Denver* cases,[7] take an exceedingly small and dim view of the powers and functions accorded to the trial judge by Section 77(e) of the Bankruptcy Act, a very large and generous one of the powers of the commission, under Section 77(d). • • •"

"[7] 318 U. S. 448; 318 U. S. 523; and 328 U. S. 495."

On the other hand, Judge HUTCHESON said (R. 940-941):

> "Appellees, on their part, invoking the same authorities relied on by appellants, and, in addition, the authorities cited in the margin,[8] and pointing to the clear and unambiguous language of Sec. 77(e) of the Bankruptcy Act, take large and generous views of the powers of the trial judge, • • •"

"[8] *Benton* v. *Calloway*, 165 F(2) 877; *Insurance Group* v. *Denver*, 329 U. S. 607; *Comstock* v. *Group of Institutional Investors*, 163 F(2) 350, affirmed 335 U. S. 211."

The inference is clear that, when the Judge referred to what he called "the clear and unambiguous language of Sec. 77(e) of the Bankruptcy Act", he had in mind the colloquial connotation of the words "satisfied" and "fair and equitable". And when he referred to the "exceedingly small and dim view of the powers and functions accorded to the trial judge" he was speaking of a view of the District Court's powers which was phrased by the appellants largely in the form of quotations from the opinions of this Court.

Furthermore, the clear import of Judge HUTCHESON's opinion is that the Plan is "unfair" to the bondholders and that the Commission should provide better treatment for

them: he remanded the Plan for the purpose of working out "a *really* fair and equitable plan" (R. 948, emphasis supplied). He did not find that the Commission had failed to follow the statutory mandates or lacked material evidence to support its conclusions; if he had so found, the logical course would have been to remand the Plan for further consideration by the Commission, as this Court did in the *Milwaukee* case on sustaining the objections to the treatment of the holders of the General Mortgage Bonds (318 U. S. 569-571) and as the Court of Appeals for the Second Circuit did in *In Re New York, N. H. & H. R. Co.*, (1945) 147 F. (2d) 40 (1940).

The principal reason which Judge HUTCHESON gave for concluding that the Plan was "unfair" was that it was the duty of the Court of Appeals "to accord full weight to [Judge SIBLEY's] conclusions that the Plan was not fair" (R. 945), a reason which clearly presupposed that it was the function of the District Court to determine, after the "independent investigation" to which Judge SIBLEY referred, whether the Plan was "fair" in the colloquial sense, and that it was the duty of the Court of Appeals "to accord full weight" to such a conclusion.

The view of the respective functions of the Commission and the Court adopted by the majority in the Court of Appeals was, therefore, substantially the same as that held by those who, prior to the decisions of this Court in the *Western Pacific* and *Milwaukee* cases, asserted that under Section 77 the Commission and the Court had coordinate jurisdiction to determine whether a plan was "fair".

Judge HOLMES correctly stated the respective functions of the Commission and the Court (R. 951, 953-954):

> "The court has its limited duties to perform, as does the Commission; but each acts separately within its special sphere, and neither is permitted to usurp the prerogatives of the other."
>
> • • • • • • • •

> "The functions of the court, in approving or rejecting a plan, are purely judicial. The delegated power of the Commission in devising and proposing the plan is legislative, executive, and quasi-judicial. The greatest tribute that can be paid to the federal courts is that they do not seek to extend their jurisdiction by usurpation. Cf. Rose on Federal Jurisdiction (2nd Ed.), Section 16, p. 21."

The Courts of Appeals in other Circuits have respected the correct division of authority between the Commission and the Courts in the cases referred to above at p. 2. There is, therefore, a conflict between the decision of the Court of Appeals in this case and the several decisions of Courts of Appeals in other Circuits above referred to. Moreover, unless this case be reviewed, it may be expected that the opinions herein will not only substantially veto this Court's opinions in the *Western Pacific, Milwaukee* and *Denver* cases so far as the Fifth Circuit is concerned, but that they will cause confusion and uncertainty in other Circuits.

• • • • •

After having said that he would defer "to the finding that the valuation of the railroad property as fixed by the Commission is equalled by that of the Coast Line securities" (R. 479) Judge SIBLEY suggested that there was "a fault in the Commission's finding of equivalency" in that the Commission "overlooked that the plan makes the preferred stock callable at par at any time" (R. 480). There was so little basis for a conclusion that this feature of the Plan was "overlooked" (267 I. C. C. 753) that no serious effort was made in the Court of Appeals to sustain Judge SIBLEY's order on that ground and it is not mentioned in Judge HUTCHESON's opinion, unless possibly by the reference in that opinion to Judge SIBLEY's "other reasons" (R. 946).[1]

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[1] The plan proposed by the Coast Line provided for non-participating, non-voting preferred stock, callable at par and accrued dividends (267 I. C. C. 297-298). The Commission made the stock participating and voting (267

(*Continued on p. 23*)

QUESTION (3)

The Power of the Court to Supervise the Commission's Discharge of its Responsibilities

Judge HUTCHESON expressed the opinion that the "tremendous overemphasis on and the preoccupation of the commission* with the struggle on the one hand of the St. Joe Paper Co., and on the other, of Coast Line for control of the debtor, with its subordination of the primary question of the legal and equitable rights of the bondholders as such" led to the approval by the Commission of a Plan which was "unfair" to the bondholders (R. 945-946). Judge RUSSELL apparently agreed with Judge HUTCHESON as to this (R. 950).

Judge HUTCHESON did not hold that the Commission had failed to follow the statutory mandates or lacked material evidence to support its conclusions.

As already noted at p. 9-10, what Judge HUTCHESON called "the struggle * * * for control of the debtor" involved not merely the question whether there should be St. Joe Paper Company control, with consequent positive disadvantages to the public, but also the question whether there should be a merger with the Atlantic Coast Line, with consequent important advantages to the public in financial stability, economies of operation and betterment of service. The Commission was clearly right in its view that the public interest in the future operation of the railroad as part of the national transportation system was worthy of its fullest consideration.

As also already noted at p. 11, the Commission's con-

(*Continued from p. 22*)

I. C. C. 376, 753-754). It estimated the probable prospective market value at $70 a share (267 I. C. C. 737). The Commission did not merely provide in the order approving the Plan that the preferred stock should be redeemable (267 I. C. C. 753); it specifically referred to that feature of the stock in its report of April 8, 1947 (267 I. C. C. 380-381). The redemption price (par, plus accumulated dividends and the current dividend to the date of redemption) was bound to be almost 50% more than the estimated market price of the preferred stock under market conditions prevailing when the Commission acted. The bondholders could not object to such a redemption provision. On the other hand, the Commission has never approved a non-callable preferred stock for a railroad undergoing reorganization in Section 77.

* Footnote omitted.

sideration of the private interests was extensive and reflected a clear conception of its duty to provide "equitable equivalents" for the bondholders.

Judge HUTCHESON's opinion that "the legal and equitable rights of the bondholders as such presented the *primary* question" is in conflict with many statements in this Court's opinions. Cf. *Western Pacific* case, 318 U. S. p. 468, and the first *Denver case*, 328 U. S. p. 535-536. As he considered the private interests primary, Judge HUTCHESON must have considered the public interest secondary.

The Commission correctly stated the theory of Section 77 and its own responsibilities (267 I. C. C. 305):

> "[The Atlantic Coast Line] has been admitted as a party to the proceedings by us pursuant to our authority and duty to promulgate a plan which is not only fair and equitable to the creditors but compatible with the public interest in the maintenance of an adequate transportation system. This is in full accord with the theory of the act. Under the statute we are charged with the dual duty of promulgating a plan which will be fair and equitable to the creditors and which will be compatible with the public interest."

Actually there was no conflict between the public interest and the private interests of the bondholders *as a class* in obtaining the best possible treatment for their bonds, since the Commission found that the merger plan would provide better treatment than an internal plan (267 I. C. C. 379, 740-741).

The sentences or small sections of the Commission's comprehensive Reports to which Judge HUTCHESON referred in a footnote (R. 945-946) as evidencing the Commission's "tremendous overemphasis" on and "preoccupation" with control are either unexceptionable or immaterial. To put them in their proper setting and analyze them would unduly extend this statement.[1]

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[1] To mention the one which is referred to in the footnote at the greatest length:

(*Continued on p. 25*)

Judge HUTCHESON's conclusion that the Commission overemphasized and was preoccupied with the question of control was presumably based primarily on the extent to which all phases of the public interest were discussed in the Commission's Report of April 8, 1947. He made no specific criticism of the extensive discussion in that Report, already referred to, of the private interests. Moreover, he gave no weight to the fact that the proceedings in connection with the reargument, consuming almost a year, culminated in the Commission's Report of March 25, 1948, which was devoted almost exclusively, except for the discussion of legal questions, to the treatment of the bondholders (267 I. C. C. 729-745).

More important, it is clear that Judge HUTCHESON undertook to exercise a type of supervision over the discharge by the Commission of its responsibilities which the Congress did not intend the Courts to exercise in Section 77

(*Continued from p. 24*)

The reference to a foreclosure sale is contained in the report of April 8, 1947 (267 I.C.C. 307). That report followed shortly after Judge FRANK of the Circuit Court of Appeals for the Second Circuit had handed down his dissenting opinion in *Old Colony Bondholders* v. *New York, New Haven & H. R. R. Co.* 161 F. (2d) 413, 431-439, and before this Court had denied certiorari in *Protective Committee for Bonds of Old Colony Railroad Co.* v. *New York, New Haven & H. R. R. Co.* (1947), 331 U. S. 858, rehearing denied (1947) 332 U. S. 803. There was therefore confusion and uncertainty as to the possible necessity for a foreclosure sale. The minority of the Commission insisted that the Atlantic Coast Line should not acquire the property except "as a result of making the highest and best bid at a public sale at which other bidders, including the bondholders of the debtor, have a chance to compete" (267 I. C. C. 391), although this proposition was not repeated in the dissent to the report on March 25, 1948 after this Court had denied certiorari in the *Old Colony* case (267 I. C. C. 745-747).

The discussion of a foreclosure sale in the report of April 8, 1947 was irrelevant, and was superseded by an able analysis of the law in the report of March 25, 1948 (267 I. C. C. 732-734).

However, the sentence quoted by Judge HUTCHESON does not lead to any inference that the Commission was preoccupied with the subject of control. The gist of it is that a requirement for a judicial sale would almost certainly block the approved plan. In the event of such a sale the bondholders could bid with their bonds and any bid by the Atlantic Coast Line would have to be all in cash. Except possibly through an underwriting at heavy cost, the Coast Line could not make a successful "all cash" bid even if a competing bid of bondholders wishing to acquire the property was much less than the value of the cash and securities to be provided for by the Coast Line under the Plan. The Commission may well have assumed that it would not approve the heavy cost of underwriting an "all cash" bid, as underwriting costs caused much of the criticism of equity foreclosures prior to the enactment of Section 77. *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Railway Co.* (1935) 294 U. S. 648, 685.

cases. He did not hold that the Commission had failed to follow the statutory mandates or lacked material evidence to support its conclusions as to the treatment of the bondholders. Instead, drawing an inference as to the subjective processes of members of the Commission, he took as a premise that a majority of the Commission were preoccupied with matters of the public interest and from that proceeded to the conclusion, which would hardly follow from the premise, that the Commission should have provided better treatment for the bondholders.

QUESTION (4)

The Materiality of Opposition to the Plan

Judge SIBLEY, whose opinion Judge RUSSELL adopted, considered the opposition of a majority in amount of the holders of the First and Refunding Mortgage absolutely decisive: that opposition was the basis for the first two grounds which he gave for disapproval of the Plan (R. 475-477) and in considering whether the Plan was "fair and equitable" he said (R. 478):

> "Most of the bondholders wish to continue to own and run the railroad. Many of them bought bonds during this proceeding with that purpose, as they had a right to do."

Judge HUTCHESON ruled that the power existed to effect "a merger over the objection of the debtor and all its creditors" (R. 947). He also spoke of "such irrelevancies as desire for control" (R. 947), indicating that the St. Joe Paper Company's desire "to own and run the railroad" was not a valid basis for an objection to the Plan, although Judge SIBLEY's opinion is replete with evidence that he regarded a desire "to own and run the railroad" as the strongest and most reasonable basis for objecting to the Plan. But Judge HUTCHESON concluded by giving dominant effect to the opposition of the Claughton group, the Conn group and the Lynch inter-

ests (R. 947). He did not say that any of those three groups had shown that the Plan provided an inadequate consideration for the Bonds; he did not discuss the evidence that they had reasons not common to the bondholders as a class for opposing the merger plan;[1] after having said that the consummation of the Plan "would be natural and reasonable" except for the opposition to it (R. 943), he treated the fact that the Claughton, Conn and Lynch groups opposed the Plan as justifying the conclusion that it was unfair in the colloquial sense.

The treatment of the mere fact of opposition, however substantial the opposition may be, as establishing anything of legal significance conflicts with this Court's rulings in *National Surety Co.* v. *Coriell* (1933) 289 U. S. 426, 435-437; *First National Bank* v. *Flershem* (1934) 290 U. S. 504, 525-526; *Case* v. *Los Angeles Lumber Products Co.* (1939) 308 U. S. 106, 114-115; and *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company* (1946) 328 U. S. 495. It also presents a clear conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In Re New York, N. H. & H. R. Co.* (1945) 147 F. (2d) 40, 49.

The law was correctly stated by Judge Holmes (R. 952):

> "There is no provision of law for the court or judge to submit the plan to the creditors or to give any consideration before the vote is taken to how the creditors will vote on it. The best rule for any court, trial or appellate, is to decide the issues presented to it and to decide nothing more than is necessary to dispose of the case. *Dictum* should be avoided and forecasts discountenanced."

The Commission made a quasi-judicial determination on the basis of the evidence. The gist of the opinions of a majority of the Court of Appeals is that it should make a redetermination and that even if the evidence be the same it should reach a different conclusion because holders of

[1] See above, p. 12-14.

bonds, small in number though large in amount, disagree with the determination.

QUESTION (5)

The Court's Supervision of the Commission's Discharge of Its Responsibilities

Despite the Commission's finding that a merger would produce greater financial stability, economies of operation and betterment of service, Judge RUSSELL adopted Judge SIBLEY's view that if a majority in amount of the bondholders "wish to continue to own and run the railroad" a merger plan "ought to be a last resort" (R. 478).

Judge HUTCHESON may also have adopted Judge SIBLEY's view on this subject, since he spoke with approval of Judge SIBLEY's "other reasons" for holding the plan not "fair and equitable" (R. 946). In any event, after making the extraordinary statement that "the Commission has changed and vacillated, and vacillated and changed, and vacillated again",[1] he referred to the Commission as having developed "an *idee fixe*" and as having approved the Plan "in desperation" (R. 948).

Under this Court's decisions the Commission has the "leadership" in deciding whether a merger plan or an internal plan is more suitable. *Western Pacific* case, 318 U. S. p. 468.

The policy of the Congress is to favor the unification of non-competing carriers in order to strengthen the national transportation system. *Schwabacher* v. *U. S.* (1948) 334 U. S. 182, 191-194. The Commission has rightly facilitated the "union of the weak with the strong". *Nickel Plate Unification* (1926) 105 I. C. C. 425, 449. What is more suitable than a plan for the unification of an insolvent short-line railroad with a strong connecting trunk line?

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[1] This statement is extraordinary because the Commission has made only one significant change—from an internal plan to a merger plan—and it made that change (i) after strong objections from bondholders to the internal plan, (ii) a reopening of the case, (iii) a hearing lasting for almost a full month, and (iv) extensive consideration, including a reargument.

The successful reorganization of the Alton through unification with the Gulf, Mobile and Ohio testifies to the wisdom of Congress in expressly providing in Section 77(b) for such a merger plan. *Alton Railroad Company Reorganization* (1945) 261 I. C. C. 343. Judge HUTCHESON referred to the Plan in this case as "natural" except for one thing, viz, the opposition of bondholders (R. 943).

Clearly the fact that a small number of bondholders opposed the Plan did not compel the Commission to consider the approval of the Plan "a last resort", even though the opponents of the Plan held a large amount of Bonds. The statement by the Court that a merger plan "ought to be a last resort" cannot be reconciled with this Court's declaration that Congress intended "to place reorganization under the leadership of the Commission".

QUESTIONS (6), (7) & (8)

The Court's Consideration of "Changed Conditions"

Judge SIBLEY said (R. 479):

> "* * * I am impressed that evidence produced before me, if it had been before the Commission, might have produced a different result. The materials for some of it already existed, but were not assembled for or considered by the Commission, and some relate to occurrences since it made its finding."

This reason for the disapproval of the Plan was adopted by Judge RUSSELL and appears also to be included among Judge SIBLEY's "other reasons" adopted by Judge HUTCHESON (R. 946).

In the sentences succeeding those quoted Judge SIBLEY made a number of statements which we deem erroneous, but we will not pause to note the errors, except to say that his statement that "the East Coast has consistently continued to net more than $1,500,000 that the Commission has fixed as its normal rate" is in direct conflict with the Commission's finding as to the earnings for the year

1947 (the last year for which figures were before the Commission) as calculated by the Commission after two clearly necessary adjustments of the reported earnings (267 I. C. C. 738-739).

It is perfectly clear that Judge SIBLEY purported to express an over-all judgment that the Plan is "unfair" without distinguishing between

(1) evidence before the Commission;

(2) evidence relating to the period prior to March 25, 1948, which could have been, but was not, before the Commission; and

(3) evidence relating to the period subsequent to March 25, 1948.

Judge SIBLEY made no finding, and there was no basis for a finding, that there was any change in conditions after the Commission had issued its report of March 25, 1948 which made the Plan, if "fair" on that date, unfair later.

Taking Questions (6), (7) and (8) in sequence:

(6) Under this Court's decisions it is not permissible for a District Court to form an over-all judgment, based on all of the categories of evidence listed above, and to make no distinction between the conditions which existed at the time when the Commission approved a plan and those that exist when the plan comes on for approval by the Court. If such a course were permissible the inevitable effect would be to obliterate the division of authority between the Commission and the Court which this Court has found Section 77 prescribes.

(7) The statements in this part of Judge SIBLEY's opinion do not constitute findings to which Rule 52 (a) of the Federal Rules of Civil Procedure applies. Whether or not Rule 52 (a) could ever apply, Judge SIBLEY did not "find the facts specially". Furthermore, he limited himself to indicating the things by which he was "impressed" and those by which he was "confused" (R. 479).

(8) The decisions of this Court relating to the approval of plans may have left open the question whether changes

in conditions subsequent to the approval of a plan by the Commission may warrant a disapproval of a plan by the Court, although the first *Denver* case dealt with the effect of changes between the approval of a plan and its confirmation (328 U. S. 495, 535). But, whatever may have been the situation prior to the enactment of Section 3 (a) (3) of the Mahaffie Act, the text of which will be found at the end of the Appendix, we submit that the law is now clear and that in this case any opposition to the Plan on the ground that there have been changes in conditions should be the basis of a petition to the Interstate Commerce Commission and cannot be the basis of an objection to the Plan in the Court.

The reason why the opponents of the Plan have not had recourse to Section 3 (a) (3) of the Mahaffie Act will readily appear from an examination of Atlantic Coast Line Exhibits Nos. 19 and 20 in Vol. II of the Record, which establish that any changes in conditions between the time of the Commission's approval of the Plan and Judge SIBLEY's disapproval of it operated to make the Plan even more favorable than it appeared when the Commission acted.

QUESTION (9)

The petitioners contend that under 28 U. S. C. § 2106 this Court has the power to remand the cause and direct the entry of an order approving the plan and if the writ be granted will urge this Court to do so.

Statements in, and Omissions From, Judge Sibley's Opinion

The petitioners adhered below to the view expressed herein as to the respective powers of the Commission and the Court, but under all the circumstances they considered it suitable to discuss in their briefs in the Court of Appeals many statements in Judge SIBLEY's opinion which they deemed clearly erroneous and many omissions from Judge

SIBLEY's opinion with respect to facts which would be material if the test were one of "colloquial equity". In view of the requirements of Rule 38 (2) of this Court the petitioners have not followed a similar course in this statement and they see no reason to expect that it will be necessary for them to do so if certiorari be granted.

Points Urged Below by Respondents

Reference has been made above at p. 14-15 to the first two grounds of Judge SIBLEY's disapproval of the Plan which were not sustained by a majority of the Court of Appeals. Judge HOLMES disposed of both these grounds for reasons that are unassailable (R. 950-952). They are referred to here only in order to be sure that, if the questions they present are argued by the respondents, petitioners will not be barred from replying to the respondents' arguments. It is assumed that if any of the respondents should argue any grounds for the disapproval of the Plan in addition to the three grounds given in Judge SIBLEY's opinion, petitioners will not be barred from answering the respondents' arguments.

CONCLUSION

This Court's opinions in the *Western Pacific, Milwaukee* and *Denver* cases established that the Congress intended the primary sanctions for a railroad reorganization under Section 77 to be determinations of the Commission, legislative and administrative as to the public interest and quasi-judicial as to the private interests.

Section 77 was thus construed as ending the uncertain and constantly shifting distribution of power among security holders, the Courts and the Commission. It was confirmed that the Commission has primary power as to essentially business questions, as well as to matters of the public interest, subject only to requirements for judicial review which are usually applicable to administrative bodies.

The decision of the Court below undertakes to redistribute that primary power among the security holders, the Courts and the Commission in a manner wholly inconsistent with this Court's opinions and certain to create endless confusion. The opposition of a small number of holders of a large amount of bonds was treated below as of paramount importance; a single Judge sitting in the District Court was deemed to be authorized to determine what was "fair" in the colloquial sense and observations in the Judge's opinion which were not framed as findings or directed to any specific issue cognizable by the Court were treated by the Court of Appeals as binding; and the Commission's findings and conclusions were regarded as having no more weight than those of a Special Master.

The District Judge Designate and the Court of Appeals committed clear errors of law, the correction of which by this Court could greatly expedite the termination of this proceeding and the reorganization of a Debtor which has been in the Courts since August 31, 1931.

We respectfully submit that the writ should be granted.

Dated February 10, 1950

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MOTION TO DISPENSE WITH THE PRINTING OF THOSE PORTIONS OF THE RECORD CERTIFIED BY THE DISTRICT COURT TO THE COURT OF APPEALS WHICH WERE NOT PRINTED IN THE COURT OF APPEALS

1. A very large portion of the Record in the District Court which was transmitted to the Court of Appeals, including the greater part of the Record before the Interstate Commerce Commission (exclusive of the Commission's Reports), was not printed in the Court of Appeals, and has been transmitted by the Clerk of the Court of Appeals to the Clerk of this Court in the form in which it was received by the Clerk of the Court of Appeals from the Clerk of the District Court.

The circumstance that said portions of the Record in the Court of Appeals were not printed for the use of that Court presented no difficulty in connection with that Court's consideration and determination of the appeals.

A motion in that Court was made by the appellants with a view to ascertaining whether the Court of Appeals desired additional printing and the Court of Appeals deferred any action thereon until the argument.

A motion was then made by certain of the appellees to require the appellants to print any unprinted portions of the record to which they might refer in their briefs and the Court of Appeals similarly deferred action on the appellees' motion until the argument.

On the argument neither the Court nor the appellees made any suggestion that any additional printing was necessary or desirable.

2. The printed portions of the Record in the Court of Appeals, which have been duly certified to this Court, are as follows:

Vols. I and II, printed at the request of the appellants, containing, among other things, photo-lithographed copies of the Commission's Reports of January 8, 1945 (261

I. C. C. 151-193), April 8, 1947 (267 I. C. C. 295-391) and March 25, 1948 (267 I. C. C. 729-759) and the Commission's Orders of April 8, 1947 and March 25, 1948, which are at the end of the Report of March 25, 1948; the transcript of the hearing before the Judge Designate in January 1949, exclusive of the argument; photo-lithographed copies of the exhibits introduced at that hearing; Judge SIBLEY's opinion; and sundry formal papers, including the appellants' Designations of the Contents of Record;

Vol. III, printed at the request of the appellees W. G. Welbon, *et al.* and St. Joe Paper Company.

3. The portion of the Record in the Court of Appeals to which this motion relates consists of all of the documents specified in the respective Designations of Contents of Record on Appeal which were not covered by the respective Requests for Printing. The most important items comprise the record before the Interstate Commerce Commission, contained in 13 packages, each package being covered by a certificate of the Secretary of the Commission (R. 484-502). The Interstate Commerce Commission Record includes not only 5,140 pages of transcript and 303 exhibits (many of the exhibits being voluminous) but also a very large number of other things and it is estimated that the printing of the entire record before the Commission would require at least 40 volumes and perhaps many more.

4. In the Court of Appeals references were made by both sides to the unprinted portions of the Record and, as already indicated, no difficulty was encountered on that score.

5. It is not deemed practicable to undertake to stipulate, pursuant to Rule 38 (8) of this Court, with respect to printing parts of the unprinted portion of the Record to which this motion relates. Because of the mass of material involved and the difficulty of being certain in advance as

to the points which the respondents may present in an effort to sustain the disapproval of the Plan, it would be difficult to agree upon a stipulation even if there were only one respondent. There are eight and their counsel are located in five cities, Jacksonville, Miami, Tampa, Washington and New York.

WHEREFORE, your petitioners pray that this Court enter an order dispensing with the printing of those portions of the Record certified by the District Court to the Court of Appeals which were not printed in the Court of Appeals.

Dated February 10, 1950

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APPENDIX

Attributes of Plan of Reorganization.

SECTION 77(b)—first paragraph in full.[1]

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include *the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations,* the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any

[1] The text of all Section 77 provisions is taken from 11 U. S. C. A. § 205. Italics are supplied.

assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

Approval of Plan by Commission.

SECTION 77(d)—first paragraph in part.

* * * the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

Approval of Plan by Court.

SECTION 77(e)—first paragraph and first sentence of second paragraph.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objection to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and

their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment.

After such hearing, and without any hearing if no objections are filed, *the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders;* (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed as far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, *in which event he shall transmit to the Commission a copy of any evidence received.*

Confirmation of Plan—the "Cram-down" Provision.

SECTION 77(e)—third paragraph in part.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interest or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e):* * * *.

Valuation.

SECTION 77(e)—fourth paragraph in full.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the prop-

erty, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

Changed Conditions.

THE MAHAFFIE ACT, Section 3 (a) (3)
62 Stat. 162, 167-168.

(The Plan in this case was certified to the District Court on April 5, 1948. The Mahaffie Act was approved on April 9, 1948.)

Sec. 3. (a) Notwithstanding any other provision of law—

* * * * *

(3) with respect to any plan of reorganization or modified plan of reorganization which, on the date of enactment of this Act, is before any district court for approval or confirmation, no order of confirmation having been entered, or, such order having been entered, if an appeal from said order is pending in a circuit court of appeals or the matter is pending in the Supreme Court on a petition to review any order of a circuit court of appeals dealing with said order of confirmation or the time within which to make such an appeal or to file such petition has not expired, it shall be the duty of the Commission, upon petition of any party to the proceeding, to report to such court any changes, facts, or developments which have occurred since December 31, 1939, which were not provided for in the plan and which, in the opinion of the Commission, make it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise such plan in order to insure that if consummated and put into effect, such plan shall then, in the opinion of the Commission, be fair and equitable and in the public interest and compatible with the provisions of this section and section 77 of the Bankruptcy Act, as amended. Upon the filing of any such report by the Commission with the court, the court shall remand the plan to the Commission for such reexamination, reconsideration, and possible revision;

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 601

ATLANTIC COAST LINE RAILROAD COMPANY, *et al.*,
Petitioners,

v.

ST. JOE PAPER COMPANY, *et al.*,
Respondents.

BRIEF OF RESPONDENTS THE LYNCH INTERESTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE

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OCTOBER TERM, 1949.

No. 601.

ATLANTIC COAST LINE RAILROAD COMPANY, *et al.*,

Petitioners,

v.

ST. JOE PAPER COMPANY, *et al.*,

Respondents.

BRIEF OF RESPONDENTS THE LYNCH INTERESTS IN OPPOSITION TO PETITION FOR CERTIORARI.

Preliminary Statement.

The Lynch interests, so-called in this proceeding, consist of S. A. Lynch, S. A. Lynch Corporation and certain other bondholders acting together for the protection of their interests, as the owners of Refunding bonds of Florida East Coast Railway Company, the debtor herein.

Both before the Interstate Commerce Commission and the courts below, the Lynch interests have contended that the plan of reorganization approved by a bare majority of the Commission fails to provide fair and equitable treatment for the Refunding bondholders, fails to afford due recognition to their rights and fails to conform to legal standards in certain respects. Their contentions have been sustained by both courts below.

Opinions Below.

The opinions in the Court of Appeals are not yet reported, but are contained in the Record at pages 937 to 956.

The opinion of the District Court is reported at 81 F. Supp. 926.

The reports of the Interstate Commerce Commission are at 252 I. C. C. 423, 252 I. C. C. 731, 254 I. C. C. 865, 261 I. C. C. 151, 267 I. C. C. 295, and 267 I. C. C. 729.

Jurisdiction.

The jurisdiction of this Court is invoked by petitioners under 28 U. S. C. §1254(1). Respondents respectfully submit that the jurisdiction so invoked should be refused in accordance with rule 38 of this Court.

Statement of the Case.

This case is one of the last few Section 77 proceedings remaining in the Federal courts. The debtor railroad has a First Mortgage of $12,000,000, on which interest has been currently paid throughout the proceeding; and a Refunding Mortgage of $45,000,000 on which accumulated interest totals about $35,000,000. It has at all times been generally agreed that no equity remains for the stockholders.

Following institution of the Section 77 proceeding in 1941, the Interstate Commerce Commission held hearings and certified a plan providing a new capital structure aggregating from $35,000,000 to $41,000,000, based on anticipated normal earnings of $1,268,000 annually.

The District Court on October 19, 1943 disapproved the plan and referred it back to the Commission "to afford the Commission an opportunity to re-examine the entire situation in the light of the facts which have developed since the former hearing" (R. 697).

The Commission held further hearings. No new earnings studies were made. Instead, the Commission merely adjusted its estimate of future annual earnings from $1,268,000 to $1,500,000 in recognition of anticipated savings from part of a planned improvement program. On this basis, it provided in its plan of January 8, 1945 for a capital structure, after paying off the First Mortgage, of $40,500,000, with no fixed interest bonds (as contrasted with the potential $41,000,000 in the 1941 plan, of which $14,000,000 to $20,000,000 was in fixed interest bonds).

At the same time the Commission rejected the first offer of Atlantic Coast Line for the property. It pointed out that since the securities proposed to be issued under Atlantic Coast Line's offer, even if taken at par, did not satisfy the claim of the Refunding bondholders, the bondholders must be allowed the entire stock equity, with its accompanying prospects of recoupment (261 I. C. C. at 192).

In the summer of 1945 representations were made to the Commission to the effect, among others, that control by St. Joe Paper Company, a holder of a majority of the Refunding bonds, would not be compatible with the public interest. Atlantic Coast Line made a new proposal for acquisition of the debtor's properties. The Commission reopened the proceedings and in late 1945 took extensive testimony, in Washington and in Florida, principally upon the question of desirability of Atlantic Coast Line control as against St. Joe Paper Company.

This issue arose out of the fact that St. Joe Paper Company, owned by the Alfred I. du Pont Estate, had acquired over a majority of the Refunding bonds. At about the same time members of the so-called Deposit Committee sold substantially all of their holdings (R. 364). The

question was presented as to whether the du Pont Estate had other conflicting interests, whether its trustees were qualified to run a railroad, and whether the du Pont control might not mean operation for the principal benefit of a single private financial interest.

The trial examiner proposed a report which would have affirmed the Commission's 1945 plan, providing again for independent reorganization, despite the Atlantic Coast Line proposals. In April, 1947, the Commission, by a vote of 5 to 4, adopted the present plan, which was substantially the 1945 proposal of Atlantic Coast Line, except that the price it had proposed to pay in cash and securities was raised by the Commission to equal a face amount of $40,500,000, the value fixed for the properties, then and in the 1945 plan (267 I. C. C. 295).

Following reargument, the Commission again split in its position, 6 of the Commissioners favoring adoption of the Atlantic Coast Line plan, while 5 of the Commissioners voted against the plan (267 I. C. C. 729).

At the hearing before the District Court, the creditors were united in their opposition to the plan*, except for the Deposit Committee, which spoke for about 1.3% of the Refunding bonds. The Lynch interests introduced substantial evidence through William A. Gordon, member of Coverdale & Colpitts, bearing upon post-war conditions and prospects (R. 227-288; Lynch Exs. 1-33). This evidence was not controverted. Previously the Commission had declined to reopen its record to receive such evidence of post-war conditions (267 I. C. C. at 729).

---

* Since it is generally conceded that the First Mortgage bonds would be paid off under any plan and that the stockholders would get nothing under any plan, the Refunding bondholders are the only security holders substantially affected.

The District Court concluded that the plan proceedings should be referred back to the Commission (R. 466-481). The Court of Appeals affirmed.

Petitioners assert in their petition that if review is granted, they will ask this Court to remand the cause and "direct the entry of an order approving the plan".

Question Presented.

The only question presented is whether, under the facts of this particular reorganization, the District Court acted within the scope of its authority when it disapproved the plan of reorganization put forward by the Interstate Commerce Commission. The Court of Appeals affirmed the District Court and consequently held that the District Court acted within the scope of its authority.

The first seven of the nine questions alleged by petitioners to be presented are in effect different facets of the central question above, although petitioners pose the questions upon the basis of certain assumptions not here valid. The eighth and ninth questions asserted by petitioners, it is submitted, are not here raised.

ARGUMENT.

I.

Disapproval by the District Court of the plan and affirmance of that disapproval by the Court of Appeals raise no questions for review by this Court.

Before the District Court, Atlantic Coast Line took the position that the court was in effect a mere rubber stamp and could only approve the plan of a majority of the Commission (R. 909). Before the Court of Appeals it mod-

ified its position slightly and now, in its petition, it seemingly retracts a little further. But in essence its position is that the District Court had no discretion as to approval.

Petitioners' position overlooks, however, the facts of this case. It disregards, for example, (a) the errors of the Commission, referred to below, (b) the fact that the Commission split almost evenly, a bare majority approving the plan, (c) that the District Court received a large volume of evidence, in accordance with the statutory provisions, that made plain the Commission's disregard of statutory standards, and (d) that the conclusion of the District Court was affirmed by the Court of Appeals.

The petition attempts to find a lack of logic or consistency in the opinions below, while disregarding the pertinent facts to which appropriate legal principles must be applied.

It is the firmly established policy of this Court that in so far as the issues raised by petitioners involve questions of fact upon which the two lower courts concur, they will not be reviewed by this Court. "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Institutional Investors,* 335 U. S. 211, 214 (1948); *Page* v. *Arkansas Natural Gas Corp.,* 286 U. S. 269, 271 (1932); *Williams Mfg. Co.* v. *United Shoe Machinery Corporation,* 316 U. S. 364, 367 (1942). To similar effect, see *Marcos* v. *Wilson Cyprus Co.* 269 U. S. 82 (1925); *Southern Pacific* v. *Bogert,* 250 U. S. 483 (1919). The District Court here heard the witnesses and examined the exhibits; the Court of Appeals had the benefit of extended examination of the record, voluminous briefs, and oral argument. They have united in condemning the Commission's plan. It is submitted therefore, that in

accord with this established practice, the action in the courts below with respect to matters of fact should not be reviewed.

A. The District Court's Disapproval of the Plan Falls Well Within the Limits of District Court Action Heretofore Fixed by this Court.

The plan adopted by a bare majority of the Commission contained a number of substantial errors and omissions, any one of which, we submit, would have justified disapproval. It suffices to refer to those that can be briefly presented:

1. Price Paid for Bonds Erroneously Relied Upon.

A majority of the Commission concluded that since the value to be received by the Refunding bondholders equaled certain estimates of the prices paid for those bonds (the estimates having been made by counsel for Atlantic Coast Line and not of record) that "the claim of the first and refunding bondholders will under the approved plan be adequately satisfied is obvious" (267 I. C. C. 738). This departure from legal standards was pointed out by the District Court (R. 478).*

Commissioner Mahaffie's dissent emphasized this point (267 I. C. C. at 746):

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* The law is well settled. See, among others: *Cromwell* v. *Sac County*, 96 U. S. 51; *Wade* v. *Chicago S. & St. L. R. Co.*, 149 U. S. 327; *Standard Gas & Electric Co. v. Deep Rock Oil Co.* (C. C. A. 10th), 117 F. 2d 615 (Cert. den. 313 U. S. 564); *Radio-Keith Orpheum Corporation* (C. C. A. 2nd), 106 F. 2d 22 (Cert. den. 308 U. S. 622; rehearing denied 308 U. S. 622); *Security-First Nat. Bank of Los Angeles* v. *Rindge Land & Navigation Co.* (C. C. A. 9th), 85 F. 2d 557, rehearing denied, 86 F. (2d) 3 (Cert. den. 299 U. S. 613; rehearing denied 300 U. S. 686); *Texas Hotel Securities Corp.* v. *Waco Development Co.* (C. C. A. 5th), 87 F. 2d 395 (Cert. den. 300 U. S. 679, rehearing denied 301 U. S. 713, second motion for rehearing denied 81 L. Ed. 1367).

> "This remarkable finding seems to be based on an appendix attached to the summary of the argument of counsel for the Coast Line. It is not of record in this proceeding. And even if the facts stated in it were proven they would not afford a valid basis for the finding above set out."

The Commission's employment of improper legal standards in this instance alone was sufficient to justify disapproval. Even in a case involving doubt as to the standards employed by the Commission, this Court has recently directed a remand to the Commission, *Schwabacher* v. *United States,* 334 U. S. 182 (1948).

2. Refusal to Take into Account Unification Savings.

A majority of the Commission found that savings in expenses that would result from a unification of the debtor with Atlantic Coast Line justified sale of the former's properties to the latter and estimated those savings at "between $350,000 and $1,000,000 per annum" (267 I. C. C. at 325). However, despite the well established practice of crediting each of the properties with one half of such savings (I. C. C. Transcript, p. 2825), and the evidence that most of such savings would be realized within five years, the Commission refused to allow the debtor any credit therefor, totally disregarding this factor in its valuation. If the unification savings are sufficiently significant and definite to call for a forced merger, they are likewise sufficiently significant and definite to require consideration in the valuation process.

This is here borne out by the fact that if the Commission's estimate of unification savings were taken at the median, or $675,000, an equal division between the debtor and Atlantic Coast Line would add $337,000 to the debtor's annual earning power. Capitalizing this amount at 4%

would add $8,400,000 to the value of the debtor and to its sale price.

Under the rule of *Securities and Exchange Commission* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 128 (1949), this is a "particular question which arose in the valuation process", analogous to the questions in the valuation process therein reviewed by this Court. It is submitted that on this single ground alone, the conclusion of the District Court that the plan could not be approved was fully justified and wholly within the scope of his power.

3. Refusal to Take into Account Improvements in Property.

In its earlier plan rejected by Judge Strum, the Commission found, based upon 1940 conditions, a maximum value of $41,000,000 and a minimum of $35,000,000. Since 1940, the excess of current assets over current liabilities has increased $22,954,000, while cash spent for improvements and bond acquisitions (which would otherwise still be available as cash) has amounted to $17,471,000 or a total of $40,425,000 (Lynch Exs. 1, 28, 29). *Even after allowing $12,000,000 to retire the First Mortgage bonds, this alone almost equals the total cash value approved by the majority of the Commission as the proposed sale price for all of the assets of the debtor.*

The excess of current assets over current liabilities amounts to $25,000,000 (Lynch Ex. 28) of which $8,189,000 would be required to pay the remaining First Mortgage bonds (allowing for $3,811,000 already purchased; Lynch Ex. 29). In contrast, the Commission itself estimated a value of only $30,892,500 for the entire price to be paid by Atlantic Coast Line in securities and cash (267 I. C. C. at 737). It will not do to say that excess cash under the plan will go to the Refunding bondholders, since the Commission

itself pointed out that all but about $1,300,000 (267 I. C. C. at 364) would be impounded for the benefit of Atlantic Coast Line for future improvements, working capital, discharge of prior lien and the like. Thus the Commission either largely ignored net current assets or fixed a value of only about $13,000,000 for the entire roadway, equipment and other remaining tangible assets of the debtor.

On either basis, it is submitted that the Commission clearly erred in the valuation process and failed to follow proper legal standards, within the principle of *Securities and Exchange Commission* v. *Central-Illinois Securities Corp., supra.*

4. Failure to Provide Compensation for Enforced Cash Contributions.

The plan of the Commission majority requires a large cash reserve for completion of a capital improvement program initiated when it was believed that the reorganized company would come into the hands of the Refunding bondholders. However, the plan would require that such enforced cash contribution now be made for the benefit of Atlantic Coast Line, who seeks to acquire. The Refunding bondholders receive no compensation for this enforced cash contribution. Even in adjusting its estimate of earning power, the Commission refused to credit the savings from the improvements, as estimated by the Trustees themselves.* These alone would have increased the normal year estimate of earnings by $603,000, while the Commission increased its estimate by only $232,000. In addition the bondholders are required to make other cash contributions, such as $500,000 *for cash working capital* for the benefit of

* Although the Commission erroneously attributed these estimates to witness Kennedy (261 I. C. C. 161), they were actually made by the Trustees, I. C. C. Transcript 1213-1214.

Atlantic Coast Line, for which no compensation whatever is provided.

This failure of the majority of the Commission to provide "full compensatory treatment" required disapproval by the District Court within the principle established by this Court in *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.* 318 U. S. 523 (1943), and such disapproval was clearly within the power of the District Court.

5. Failure to Provide Compensation for Deprival of Rights to Debtor's Earnings in Prosperous Periods.

The majority of the Commission verbally recognized the necessity of compensation for loss of opportunity of the Refunding bondholders to recoup past losses from future operations of the debtor (267 I. C. C. 307, 374). But it gave mere lip service. This plainly appears from the valuations fixed by the Commission, $41,000,000 in the 1942 plan under which the equity remained in the Refunding bondholders, $40,500,000 in the present plan under which equity is turned over to Atlantic Coast Line.

The Commission referred particularly to the participating feature by which the new preferred stock (given to Refunding bondholders) would participate in all dividends in excess of $4 per share on Atlantic Coast Line common stock. Its reliance on this provision, however, overlooks the fact that Atlantic Coast Line has not paid over $4 dividends on its common stock since 1931, that $4 was paid in only three of those 17 years, during which the simple average was $1.72. Taken together with the provision for call of the preferred stock at par, this renders the participating character of the stock illusory.

It is submitted that reliance by the Commission majority upon such an illusory basis for compensation consti-

tutes mere "lip service" to the rule, contrary to the principle established by this Court in *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523 at 570.

6. Failure to Take into Account Changed Conditions Resulting in Increased Earning Capacity of Debtor.

The Commission's estimate of future income of the debtor available for fixed charges after income taxes, based upon evidence of pre-war conditions, was $1,500,000. It refused to reopen the record to receive evidence of permanently changed post-war conditions (267 I. C. C. at 729). In contrast, the uncontroverted evidence before the District Court showed that in the future normal year the debtor could expect net income available for income taxes and fixed charges of $2,850,000 (R. 263-264, Lynch Ex. 27). This estimate was supported and buttressed by detailed showings (Lynch Exs. 6 to 27, inclusive, etc), as well as by comparisons with other southern carriers which indicated the relative superiority of the debtor (Lynch Exs. 2-5).

Since the record before the Commission was closed in 1945, it could not contain any evidence as to post-war conditions. The entire evidence in 1945 was in turn based upon traffic studies of the Trustees introduced at the 1941 hearings and predicated upon pre-war conditions, namely 1940 and earlier depression years.

This is evidenced, for example, by the continued reliance by the Commission upon its original estimate, based upon 1940 conditions, of annual operating income of $12,300,000 (261 I. C. C. at 159). In contrast, the postwar period shows annual operating income for 1946 of $26,543,488, for 1947 of $27,054,334 and 1948 of $28,653,000 (A. C. L. Ex. 17 and 1948 annual report).

The District Court said (R. 479):

> "• • • I am impressed that the evidence produced before me, if it had been before the Commission, might have produced a different result".

In the *Milwaukee* case, this Court said (318 U. S. at p. 542):

> "As we have indicated in the *Western P. R. Corp.* case the power of the District Court to receive additional evidence may aid it in determining whether changed circumstances require that the plan be referred back to the Commission for reconsideration."

Again in *Reconstruction Finance Corporation* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 512 (1946) it said:

> "Changes in economic conditions cannot effect the powers of the reorganization agencies even though such changes may require a reexamination into the present fairness of the former exercise of those powers."

Congressional recognition of the necessity for consideration of changed post-war conditions was embodied in the Act of April 9, 1948 (11 U. S. C. A. sec. 208). This Act provides that as to any plan of reorganization under Section 77 approved by the Commission after that date, but not finally confirmed, if the court on petition shall find

> "• • • that changes, facts, or developments have occurred since the approval of such plan by the Commission which were not provided for in the plan and which make it necessary or expedient, in the opinion of the court, that the Commission reexamine and reconsider and revise such plan in order to insure that the plan consummated and put into effect shall then, in the opinion of the court and the Commission, be fair and equitable • • •"

the court shall return the plan to the Commission.

The type of changed conditions specifically referred to in that Act include those as to which evidence was presented to the District Court in this case, such as revenues, expenses, net earnings, improvements to property and cash and net current assets.

Although the provisions of this Act do not technically apply to this case as it stood before the District Court, because of the accident that the Commission's report was rendered March 25, 1948, two weeks before the Act became effective, the principles involved, we submit, should guide the District Court in the exercise of its discretion.

B. This Court Has Upheld the District Court's Power to Review and Reject Plans.

Before a district judge can approve a plan, Section 77(e) requires that he be satisfied, among other things, that the plan

(1) is fair and equitable;

(2) affords due recognition to the rights of each class of creditors and stockholders;

(3) does not discriminate unfairly in favor of any class of creditors or stockholders;

(4) will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders.

In construing these statutory provisions as to its functions the District Court, as well as the Court of Appeals, followed the standards heretofore laid down by this Court.

In *Ecker* v. *Western Pacific R. R. Co.*, 318 U. S. 448, 473 (1943), this Court said that there is always open to the district court "the question of whether in reaching the result, the Commission has employed improper statutory stand-

ards." Also, "The district court may review to determine whether the Commission has followed the statutory mandates of subsection (e)." *Ibid,* page 477. "Thus, while judicial review does not involve an independent examination into valuation, it does require that the Court shall be satisfied upon the record before the Commission, with such additional evidence as may be pertinent to the Commission's findings of value, that the statutory requirements have been followed." *Ibid,* page 477.

It is evident that this Court intended the district court to examine carefully the Commission's treatment of creditors to determine whether the statutory mandates had been followed. In the *Western Pacific* case this Court, at pages 485-487, carefully examined the allocation of new bonds to the R. F. C. for its $10,000,000 of Trustees' certificates, noted the evidence before the district court that the new bonds were worth less than the old certificates, noted that the district court had made no finding on the point, and held that there was no evidence to indicate that R. F. C. had received more than its just deserts, as the objectors claimed.

This is even more apparent from *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.,* 318 U. S. 523 (1943), where this Court itself, in effect, remanded the plan to the Commission after finding that the treatment accorded the general mortgage bondholders was not the equivalent of the rights surrendered, since it did not include compensation for loss of seniority. The Court said (p. 566):

> "Whether in a given case senior creditors have been made whole or received 'full compensatory treatment' rests in the informed judgment of the Commission and the *District Court* on consideration of all relevant facts. A decision on that issue involves a consideration of the numerous investment features

> of the old and new securities and a financial analysis of many factors." (Emphasis supplied.)

As to whether full compensatory treatment was accorded, "The question in each case is one for the informed discretion of the Commission and the District Court." *Ibid,* p. 564. And again this Court said that "the Commission and the District Court should determine what the General Mortgage bonds should receive" as compensatory treatment. *Ibid,* p. 571.

In *Comstock* v. *Group of Institutional Investors,* 335 U. S. 211 (1948), the Court said (at p. 227):

> "In view of the functions cast upon the court in such cases, we cannot say that it may not, in its discretion, consider objections on their merits even though they have not been presented to the Commission. Some circumstances might be disclosed to indicate a remand for their consideration by the Commission. They might indicate that the courts would withhold approval, not out of deference to the objecting parties' rights but because of the broad responsibility laid upon the court for the equity and fairness of the plan as a whole."

This Court has recognized that a finding as to whether or not a plan of reorganization is fair and equitable involves the exercise of discretion on the part of the district court. As it said in *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul and Pacific R. R. Co.,* 318 U. S. 523, 564:

> "Our role on review is a limited one. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end."

Again, in *Comstock* v. *Group of Institutional Investors, supra,* the Court said (335 U. S. at p. 228):

> "The court below evidently considered the circumstances of this case to warrant such inquiry into the merits, and we do not inquire whether the discretion was wisely exercised."

These latter two observations seem particularly pertinent here, where the action of the District Court has received the approval of the Court of Appeals.

Moreover, it is not without significance that the Commission approved the plan by a 6 to 5 vote. It is a reasonable inference that if the finality attributable to certain Commission conclusions arises from its expertness, the fact that the Commission was almost evenly divided would of itself serve to cast considerable doubt upon the conclusions reached in this instance. The proposed report of the trial examiner was apparently in accord with the views of the minority of the Commission.

In the lower courts, both the District Court and a majority of the Court of Appeals have disapproved the plan. Even the dissenting judge in the Court of Appeals seemingly does not go so far as to say the plan should be approved. He criticized the District Court for including certain matters in his opinion, which, however, were not the basis for affirmance. But the dissenting judge's opinion nowhere deals with the errors in the Commission's reports nor does he anywhere say that the plan requires approval.

The dissenting judge did state that the District Court "failed to defer fully to the findings of the Commission." His meaning is not clear. If he intended that the District Court was bound by the Commission's plan, it is submitted that such a conception, while closely approaching that urged by Atlantic Coast Line below, is clearly in conflict with the

decisions of this Court referred to above. In other respects the dissenting opinion is vague as to what disposition should be ultimately made of the plan.

C. The Availability of the Power to Review and Reject Plans is Generally Accepted in the Federal Courts.

The Court of Appeals for the Second Circuit has reversed a district court for erroneously approving a plan where the collateral of certain pledgees had been the subject of erroneous valuations by the Commission, *In re New York, New Haven and Hartford R. R. Co.*, 147 F. (2d) 40 (1945).

Similarly, errors by the Commission, in matters comparable to those here involved, have been held to be sufficient grounds for refusal to approve plans in decisions by district courts rendered subsequent to the decisions of this Court in the *Western Pacific* and *Milwaukee* cases. The Connecticut District Court rejected the Commission's plan for reorganization of the New Haven for a second time in 1943, the grounds of disapproval including, among others, the failure to compensate certain secured creditors adequately, *In re New York, New Haven & Hartford R. R. Co.*, 54 F. Supp. 595. Likewise, the District Court for the Northern District of Illinois, Eastern Division, disapproved a plan of the Commission in 1943 on the ground that senior interests were not adequately compensated, saying that whether or not the Commission had made a specific finding of full compensatory treatment, "it remains for the court to determine whether the Commission was correct on this point", *In re Chicago, Rock Island and Pacific Ry. Co.*, 50 F. Supp. 835.

In addition, errors by the Commission have been grounds for rejection of its plans by district courts in other Section 77 proceedings. Significantly, these decisions have

involved at least six different district courts and no appeal was prosecuted to an appellate court in any one of them.*

D. The Plan of the Commission Majority Violated the Rule of Absolute Priority.

It is submitted that the Commission here violated the principle established in *Northern Pacific Railway Co.* v. *Boyd,* 228 U. S. 484 (1913).

There, a reorganization contract was made between secured creditors and stockholders in which the property was valued and capitalized at $345,000,000, and the stockholders allowed to participate in the new company organized for the purpose of acquiring the assets of the old company. The contract was then consummated by a so-called foreclosure sale at which the property was sold for $61,500,000, which was less than the amount of the senior creditors' claims, thus "freezing out" the unsecured creditors. This Court held that the reorganization was fraudulent and void as to unsecured creditors, because they had been deprived of their rights in the company's property, which was "a trust fund for the payment of creditors", 228 U. S. at p. 504. If there was sufficient value to permit the stockholders to participate, there must *ipso facto* have been sufficient value for the unsecured creditors.

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* See in addition to cases cited above: *In the Matter of Florida East Coast Railway Company,* unreported, D. C. So. Dist. Fla. 1943 set out at R. 690; *In re Louisiana & N. W. R. Co.,* 36 F. Supp. 636 (D. C. S. D. N. Y. 1938); *In re Denver & Rio Grande Western R. R. Co.* (D. C. D. Colo. unreported 1940), and 38 F. Supp. 120 (1941); *In re St. Louis-San Francisco Ry. Co.,* 46 F. Supp. 120 (D. C. E. D. Mo. 1942); *In re New York, New Haven & Hartford R. R. Co.,* unreported (D. C. D. Conn. 1941); *In re Boston & Providence R. Corp.,* 43 F. Supp. 327 (1942); *In re Boston & Providence R. Corp.,* 76 F. Supp. 185 (D. C. D. Mass. 1948); *In re Missouri Pacific Railroad Company,* C. C. A. 8th, unreported (1943).

It is apparent that a majority of the Commission has here proposed to do what was stricken down by this Court in the *Boyd* case. It has proposed a distribution among Florida East Coast security holders of an amount representing the equivalent of the $61,500,000 distribution in the *Boyd* case that this Court held illegal.

As pointed out by the Commission minority, the majority valued the debtor at $40,500,000 but awarded the beneficial owners a payment with an admitted cash value of only approximately $31,000,000 (267 I. C. C. at 737). The difference was to become the profit of Atlantic Coast Line, despite the fact that the Refunding bondholders had a claim of approximately $80,000,000.

In *Insurance Group* v. *Denver and Rio Grande Western R. R. Co.*, 329 U. S. 607, this Court held that the face value of new securities does not determine whether senior creditors have been compensated. Unless the cash value of the new securities equals the face amount of their claim, it there said, the claim has not been satisfied.

The Commission minority pointed out this principle in their dissent (267 I. C. C. at p. 391):

> "Cash and securities as here provided which have a value less than half the face amount of such claims do not meet this test."

The application of the doctrine of absolute priority is not inflexible. As this Court said in the *Milwaukee* case, quoting with approval its language in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510 (1941), the application of the rule "will be dependent on the facts and requirements of each case". In the same case this Court pointed out the necessity of preventing the property of one interest from being "subtly appropriated to pay the claims

of another *while lip service is rendered* the principles of priority". 318 U. S. at p. 570. (Emphasis added.)

Here, Atlantic Coast Line, as an offeror seeking to buy, having an even more tenuous position in the proceeding than a stockholder, asserts that it should be more favorably treated than stockholders whose equity is gone and who make a fresh cash contribution.

It seeks in effect, by acquisition of the properties at less than the value found by the Commission, to become a distributee of the proceeds of the transaction, by acquisition at a substantial profit, and in fact, to become the principal beneficiary of the plan.

The Commission proposed to divest the Refunding bondholders of their lien for a total claim of approximately $80,000,000 for principal and interest. In return, they would receive a new lien to the extent only of $21,375,000, on the selfsame property only, and the remainder of their lien (whether the property be valued at $40,500,000 or $80,000,000) is handed to the bondholders of Atlantic Coast Line under their after-acquired property clauses. For this lien divested from them, the Refunding bondholders are given only stock of Atlantic Coast Line, inferior to the claims of even unsecured creditors.

This is done, not in a situation involving ordinary adjustments between mortgage divisions of the same system, but in a situation involving an enforced surrender of the properties and of the bondholders' lien thereon to a third-party stranger, under circumstances that clearly violate the rule of absolute priority and result in a taking of property of the Refunding bondholders without due process of law.

II.

The petition fails to set forth sufficient reasons for granting the writ.

As we have already shown, the decision below is not in conflict with applicable decisions of this Court, but is clearly in harmony with them.

Likewise, it is evident that the decision below does not present questions of public importance requiring review by this Court. It merely affirms the conclusion by the District Court that the Commission's errors render the plan unfair and inequitable.

For convenience we will consider the petitioners' alleged reasons for granting the writ in the order set forth by them.

Questions (1) and (2).

Question (1) assumes that statutory standards have been followed, an assumption not warranted in the light of the decision of the two courts below and the facts set forth hereinabove. It further assumes that no question arises as to the doctrine of absolute priority, although this was an issue below, even before the Commission.

Question (2) assumes that, in concluding that the plan was not fair and equitable, the two courts below applied the terms in their colloquial sense, an assumption clearly contrary to fact, as already shown.

However, disregarding the form of the questions, the argument of petitioners, it is submitted, concerns itself with form rather than substance. In dealing with the function of the court, petitioners nowhere deal with the merits of the plan. Their contention that the courts below applied

the test of "colloquial equity" is based wholly upon certain comments in the opinions. These comments, however, have little significance when read in the abstract. When taken in connection with the facts of the case and the actual errors involved, it is evident that both courts below clearly understood their functions under the decisions of this Court.

Question (3).

Judge Hutcheson's comment on the Commission's preoccupation with the struggle for control of the debtor is no conceivable basis for suggesting that he "undertook a type of supervision over the discharge by the Commission of its responsibilities which the Congress did not intend the Courts to exercise" (petition, p. 25).

On the contrary, that comment is a very natural one, expressing a conclusion that is inescapable, both from the record as a whole and from a reading of the Commission's two reports before the Court.* There is no question but that the Commission was faced with a grave problem as to control, but that cannot be an excuse for disregarding the rights of bondholders. This was in fact the very reason for the 6-5 split in the Commission and the earlier 5-4 split. Judge Hutcheson could hardly overlook the fact.

Question (4).

Petitioners here confuse the second and third bases for the District Court's disapproval. The second basis related to disapproval by the bondholders, but it was not the ground

* Of the 113 pages in the two reports, over twice as much space is devoted to the question of control as is devoted to all matters of valuation, fairness of treatment and related questions. The evidence at the reopened hearing, except for that of the Lynch interests, was almost wholly devoted to the question of control.

for affirmance by the Court of Appeals. The latter affirmed on the third basis, namely that the plan is unfair and inequitable, which is the only point raised by petitioners. The Court of Appeals did not place its decision upon the fact of bondholder opposition to the plan. Consequently, further discussion seems unnecessary.

Question (5).

This question relates solely to a mere dictum or observation of the District Court that the proposed merger "ought to be a last resort." It has nothing to do with the decision. We submit that it affords no basis for review by this Court.

Questions (6), (7) and (8).

These questions relate to changed conditions. The facts are these. Judge Strum's order of October 19, 1943 disapproved the Commission's 1942 plan based upon 1940 conditions and referred it back to the Commission "in order to afford the Commission an opportunity to re-examine the entire situation in the light of the facts which have developed since the former hearing" (R. 697). Following the issuance of a new report early in 1945, the Commission held further hearings later in that year, but in its preoccupation with the question of control, gave no effect to changed conditions. It again issued a plan based on 1940 conditions. It subsequently refused to reopen the record, closed in 1945, in order to receive evidence of permanently changed post-war conditions; evidence that was not available at the 1945 hearings. In this respect, we charged in the courts below that the Commission's conduct has been arbitrary and capricious.

Section 3(a)(3) of the act of April 9, 1948, known as the Mahaffie Act and relied upon by petitioners, has no bearing on this point. As appears from the text and as the Congressional history shows, that portion of the Act has no effect on the power of the courts. It was designed to give the Commission power to require a return of the plan where it concluded that conditions required reconsideration. It was evidently included in the Act because members of the Commission had testified before the Senate Committee on Interstate Commerce that if the Commission had such power it would be able to reconsider plans in appropriate cases. It is clear that the power granted to the Commission did not diminish that of the courts and was not intended to do so.*

Question (9).

A review by this Court of all of the objections to the plan before the District Court and of the evidence relating thereto, in order to arrive at a possible conclusion that the District Court and Court of Appeals were wrong in every respect as to the plan, would impose a terrific burden upon this Court and represent a departure from principles heretofore adopted and set forth above. It is submitted that the circumstances of this case do not justify any such consequence.

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* Senate Report No. 897, Committee on Interstate and Foreign Commerce, 80th Cong. 2nd. Sess. to accompany H. R. 2298, at p. 7.

Conclusion.

For the foregoing reasons, we pray that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Dated, March 13, 1950.

Appendix.

Section 77(e) (11 U. S. C. Sec. 205(e)), First Paragraph and First Sentence of Second Paragraph.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objection to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment.

After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed as far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled

thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received.

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 601

In the Matter

of

FLORIDA EAST COAST RAILWAY COMPANY,

Debtor.

ATLANTIC COAST LINE RAILROAD COMPANY and the DEPOSIT COMMITTEE for First and Refunding Mortgage 5% Bonds of Florida East Coast Railway Company due 1974,

Petitioners,

v.

ST. JOE PAPER COMPANY, et al.,

Respondents.

BRIEF OF RESPONDENTS PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY AND J. BRYSON AIRD, SUCCESSOR TRUSTEES OF THE FIRST AND REFUNDING MORTGAGE BONDS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners, Atlantic Coast Line Railroad Company and the Deposit Committee for First and Refunding Mortgage 5% Bonds of Florida East Coast Railway Company due 1974, have applied to this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit, dated January 17, 1950, affirming an order of the District Court for the Southern District of Florida, dated January 22, 1949, which disapproved a plan of reorganization of the Florida East Coast Railway

Company, a debtor in a Section 77 proceeding, which had been certified by the Interstate Commerce Commission to the District Court on April 5, 1948.

Opinions Below

The opinions of the Court of Appeals, not yet reported, will be found in the Record at pages 937 to 956.

The opinion of the District Court is reported at 81 F. Supp. 926.

The reports of the Interstate Commerce Commission are reported at 252 I. C. C. 423, 731; 254 I. C. C. 865; 261 I. C. C. 151; 267 I. C. C. 295, 729.

Jurisdiction

Petitioners invoke the jurisdiction of this Court under 28 U. S. C. § 1254(1).

The First and Refunding Mortgage Bondholders and Trustees

The Debtor, Florida East Coast Railway Company, has outstanding $45,000,000 principal amount of First and Refunding Mortgage 5% Bonds, with in excess of $32,000,000 of accrued defaulted interest. Since the First Mortgage is to be paid in full (261 I. C. C. 170; 267 I. C. C. 383), the unsecured creditors are provided for (267 I. C. C. 365-372), and the stockholders do not claim a right to participate, both Commission and Court found that the First and Refunding Bondholders form the only class having an interest in the reorganization and are entitled to the entire equity in the road (261 I. C. C. 173; 267 I. C. C. 304; R. 477). The dissenting Circuit Judge's criticism of this finding is not borne out by the decisions of this Court in *Helvering* v. *Asphaltic Limestone Co.*, 315 U. S. 179, 184, and *Helvering* v. *Cement Investors, Inc.*, 316 U. S. 527, 532.

Of this class, $33,508,500 in amount of bonds are on record in opposition to, and $572,400 in favor of, the present plan.[1]

The Mortgage Trustees, having been appointed in early December, 1948, to succeed Chemical Bank & Trust Company and Howard B. Smith (R. 113-117), intervened in the proceedings before the District Court (R. 124-127), adopted the objections to the plan filed by their predecessors (R. 125), and participated in the appeal.

Petitioners imply that the Trustees are a mere mouthpiece for the majority interests because they were appointed by the St. Joe Company, although obviously no trustee could be appointed without that company's consent; because they refused to rely on statistical studies alone, although the Commission itself had underscored the unreliability of hypothetical market values (267 I. C. C. at 355); and because they testified that "the Trustee is ordinarily persuaded, and should be, by a large majority of its bondholders" (R. 379), although such is the accepted approach for a trustee to take (*Shaw* v. *Railroad Co.,* 100 U. S. 605, 612; *In re Schommer,* 112 F. (2d) 311, 314 (C. A. 7)).

The overwhelming majority in the present case is composed of four substantial bondholder groups, each with diverse interests, but all united in opposition to this plan.

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[1] The record shows the bond holdings to be divided as follows:

Party	*Amount*	
St. Joe Paper Co. and duPont Trust	$25,000,000	(R. 471)
W. G. Welbon, et al.	4,500,000	(R. 297-300)
F. K. Conn, et al.	1,008,500	(R. 106)
S. A. Lynch, et al.	3,000,000	(R. 472)
5% Deposit Committee	572,400	(R. 321)
	$34,080,900	
Remainder not of record	10,919,100	
	$45,000,000	

It is not the purpose of the Trustees to champion any one of these groups, but rather, as the District Judge recognized (R. 472), to speak in behalf of the $10,919,100 in amount of bonds who otherwise have no voice in the proceedings.

There is no problem of reconciling divergent interests as between the bondholders, large or small, because certain errors made by the Commission, of which the District and Circuit Courts were well apprised, deprive the plan of fairness and equity to any bondholder.

The Issues

The District Court's decision rests on three grounds—illegality of a forced merger; opposition of an overwhelming majority of the bondholders; and unfairness and inequity of the plan. In the Court of Appeals, Judge Russell adopted all three grounds, Judge Holmes rejected all three grounds, and Judge Hutcheson affirmed on the third ground. Therefore, while reserving the right to argue the first two grounds in ~~support of~~ opposition to the plan should certiorari be granted, we confine ourselves in this brief to the third ground involving fairness and equity, the only ground before the Court on this petition.

The determination of fairness and equity involves mixed questions of fact and law peculiar to the circumstances of each reorganization. In a series of key decisions this Court has carefully delimited the areas of administrative and judicial action within which these questions of fairness and equity are to be determined in each case.

Ecker v. *Western Pacific R. Co.*, 318 U. S. 448;
Group of Institutional Investors v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523;
Reconstruction Finance Corporation v. *Denver & Rio Grande Western R. Co.*, 328 U. S. 495;
Comstock v. *Group of Institutional Investors*, 335 U. S. 211.

Having defined the limits and set the standards generally applicable to all reorganizations, this Court has declined to interfere in the particular reorganization with the legitimate exercise of judgment and discretion within those limits and in accordance with those standards.

> "But we are not performing the functions of the District Court under § 77(e). Our role on review is a limited one. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end" (*Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S., supra, at 564).

The nine questions raised by petitioners at pages 3 to 5 of their brief simply play variations on one theme—lack of power in, or its improper exercise by the District Court. The questions are posed in terms of language taken from the opinions below, rather than in terms of the single holding now before this Court. That holding is simply that errors in the present plan render it unfair and inequitable as it now stands and require reconsideration by the Commission. Upon such a holding and under the decisions of this Court, the issues are simply—

1. Whether the District Court recognized and respected the limits set on his scope of action;

2. Whether there is warrant for action by the District Court taken within those limits.

Upon the issues as thus restated and condensed, petitioners have failed to show the necessity or usefulness of review under Rule 38(5) of the Rules of this Court.

ARGUMENT

POINT I

The District Judge specifically recognized and correctly stated his limited role in the evolution of a "fair and equitable" plan.

Petitioners would strip the District Judge of any independent affirmative participation in the evolution of a "fair and equitable" plan and would confine him solely to review for errors of law and arbitrary action by the Commission. Judge Sibley, District Judge Designate, as affirmed by Judges Hutcheson and Russell, rightly refused to accept the role of a procedural figurehead for the pro forma approval and confirmation of a plan. Petitioners' contentions disregard reorganization history and the terms of the statute, and misinterpret the opinions of this Court.

1. Reorganization History

Reference herein is made to the equity receivership and reorganization simply to emphasize the critical role of the judiciary in insuring a "fair and equitable" plan prior to legislation on the subject. Section 77 was not enacted in a vacuum and must be read in the light of its background (see *Continental Bank* v. *Rock Island Ry. Co.*, 294 U. S. 648, 672). Accordingly, the "informed, independent judgment" required in equity (*National Surety Co.* v. *Coriell*, 289 U. S. 426, 436) and in Section 77B reorganizations (*Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115) should not be read out of Section 77 except where required by the statutory language as shown below (see *United States* v. *Barnes*, 222 U. S. 513, 520).

2. Section 77

The enactment of Section 77 took out of the hands of bondholders' committees and other private interests the

responsibility for perfecting a plan which protected minority interests and provided a sound capital structure in the public interest, and placed this responsibility in the Commission. But Section 77 did not shift from the Courts the ultimate responsibility that the plan be "fair and equitable" and in fact incorporated in Section 77(e) the very findings which the Courts had come to make in the older equity reorganizations. Under that section, the Judge must be "satisfied" in order to approve a plan that

> "(1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders."

These ultimate findings the District Court must affirmatively and independently make upon the record before the Commission and the additional evidence taken before him. The scope of these findings has been limited only in the two fields where the statutory scheme confers power on the Commission alone. The first is the field of public interest. Under Section 77(d) a plan may not be certified to the Court unless it in the opinion of the Commission "will be compatible with the public interest". No such finding is required of the Judge under Section 77(e). The second is the field of valuation. At the end of Section 77(e) it is provided that "if it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the Court in its report on the plan". On the other hand, the Court is nowhere directed to redtetermine such value.

While valuations and public interest are for the Commission under the statute, the Court must still review these elements, as it must review any administrative action, for arbitrary or illegal findings.

3. The Cases

The two statutory limitations on the Judge's scope of review have been summed up by this Court in the case of *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western R. Co.*, 328 U. S. 495, as follows:

> "The answer reached by Congress was that the experience and judgment of the Commission must be relied upon for final determinations of value and of matters affecting the public interest, subject to judicial review to assure compliance with constitutional and statutory requirements" (at p. 508).

It has long been held that "the judicial process in bankruptcy proceedings under Section 77 is, as it were, brigaded with the administrative process of the Commission" (*Palmer* v. *Massachusetts,* 308 U. S. 79, 87), but petitioners would limit the scope of review on all phases of reorganization solely to the above narrow review of valuation and public interest. The Courts have never so read the statute. The quotation from the *Denver* case on pages 16 and 17 of petitioners' brief follows directly the above quotation from that case and refers solely to the Court's review of public interest and valuation.

In contrast, the leading case on the co-ordinate functions of Court and Commission, *Ecker* v. *Western Pacific R. Co.,* 318 U. S. 448, confers on the District Court—

> "definite responsibility in reorganization" (at p. 471);

finds that except for public interest and valuations—

> "Upon the other findings of the Commission, the District Court exercised an independent judgment based upon the record and the findings of the Commission together with additional evidence produced before the court by the parties" (at p. 467);

and specifically approves this exercise of the Judge's functions—

> "In this case, we are of the view that the District Court performed its required functions in accordance with the requirements of the statute" (at p. 475).

And, as if this statement of the District Judge's positive functions were not enough, this Court in the case of *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523, 568-571, remanded a plan to have the District Court consider, along with the Commission, what a class of bondholders "should receive in addition to a face amount of inferior securities equal to the face amount of their old ones, as equitable compensation, for the loss of their senior rights" (at p. 571). Just such a consideration was made by Judge Sibley in the case at bar (R. 480) and yet is attacked by petitioner as beyond his powers.

Finally, this Court has gone even further in the case of *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, in holding a District Court authorized to consider objections on their merits not even raised before the Commission, "because of the broad responsibility laid upon the court for the equity and fairness of the plan as a whole" (at p. 227).

The remaining cases cited by petitioners are not in conflict with those discussed above, and if they limit judicial review at all, do so only as to valuations and public interest. Any other interpretation would violate the plain terms of the statute and render meaningless the affirmative findings to be made under Section 77(e). For to give the Judge power to review only for errors of law and lack of supporting evidence is to give him no more than he already has without statutory authority. That is to say, the law has long been that Courts will always review the findings of administrative agencies to determine whether there is error of law or lack of substantial supporting evidence in the record.

Interstate Commerce Commission v. *Union Pacific Railroad Co.*, 222 U. S. 541, 547-548;

Interstate Commerce Commission v. *Louisville and Nashville R. R. Co.*, 227 U. S. 88, 92;
N. L. R. B. v. *Hearst Publications*, 322 U. S. 111, 130-131.*

If this limited review were all that Congress intended, it would have left the matter to the Courts under the above doctrine, or stated the limitation expressly, as in Section 24(a) of the *Public Utility Holding Company Act of 1935* (15 U. S. C. Sec. 79x, 49 Stat. 834):

> "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

Review of the "fairness and equity" of a utility simplification under Section 11(e) of the above Act was limited by this specific Congressional directive in the case of *S. E. C.* v. *Central Illinois Securities Corporation*, 338 U. S. 96, cited by petitioners at page 19 of their brief as an authority against the exercise of "colloquial" equity in a railroad reorganization. The difference between the statutory standards of review in the two cases is obvious. In the one, the Court is merely a reviewing agency on the facts. In the other, the Court must make affirmative findings of its own on the question of fairness and equity, a mixed question of fact and law. This Court itself noted in the *Central Illinois* case the danger of citing precedents on judicial review under one statute as precedents for judicial review under another (338 U. S. at p. 122). Further, this Court's analogy in the *Central Illinois* case to review under Section 77 is limited entirely to the proposition that Interstate Commerce Commission findings of *valuation* are final if supported by substantial evidence.

Petitioners throughout refuse to recognize a distinction between subsidiary determinations of fact as to valuations of property and the ultimate finding of equitable compensation based on those valuations. It is one thing

* See also the *Federal Administrative Procedure Act*, Sec. 10(e) (1946) (5 U. S. C. Sec. 1009(e); 60 Stat. 243).

to say that the Judge shall defer to the Commission's essentially business evaluations of the worth of the Florida East Coast Railway. It is another matter altogether to take from the Judge his power and duty of independent review of the question whether the plan based on that valuation affords "fair and equitable" treatment to the bondholders, just because the Commission says it does.

The function of the Commission is to formulate a plan compatible with the public interest. The Judge's function is to insure that private interests are not unduly subordinated in the process. The protection of private rights is a traditional judicial prerogative which the Judge is well qualified by experience to handle.

Under the statutory scheme and the cases construing it, then, we submit that the District Judge correctly stated his functions. In fact the following quotation from his opinion will show how very close his analysis is to that approved in the *Western Pacific case* (318 U. S., supra, at pp. 467, 475):

> "I think the statutory provisions are to be followed as written, Commission and court each acting in the sphere assigned" (R. 472).
>
> "I conclude that the matter of compatability with the public interest of a plan is left to the opinion of the Commission and is not to be reviewed by the judge. Also that certifications of value by the Commission are in general final if the legal standards have been observed. Both are within the peculiar expertness of the Commission. An exception may exist if the judge is investigating a question of Constitutional right which transcends the statute, for such are always judicial rather than administrative questions. And on the matters about which the statute says the judge must be satisfied in order to approve a plan or confirm it over rejection, he has the right to make his independent investigation and is not bound by the conclusions of the Commission thereon. That the judge is not restricted to the facts certified by the Commission but may take additional evidence, is shown by the requirement that if the matter is sent back to the Com-

mission a copy of the additional evidence shall be sent to the Commission. What is fair and equitable and what gives due recognition to the rights of each class of creditors and stockholders, and what is the law of the land, are matters of a judicial nature and within the peculiar expertness of the courts. On them the judge has the last word" (R. 474).

POINT II

The District Judge was amply warranted in returning the plan to the Commission for reconsideration of the treatment to be accorded the Bondholders.

The opposition of the Mortgage Trustees to the present plan is based upon major defects which fully warrant the determination of the District Judge that the treatment accorded the Bondholders was not fair and equitable and ought to be reconsidered by the Commission:

1. The Standard of Valuation

The sale of the Florida East Coast Railway to the Atlantic Coast Line presents other problems in valuation than the mere recapitalization of a single railroad or the simplification of structure in a complex railroad system.

a. The Debtor's Properties

We question whether a capitalization of $40,500,000 made purely on the basis of future earning power in the last plan of internal reorganization (261 I. C. C. 151, 166) affords by itself a fair standard of valuation when adopted in the present merger plan (267 I. C. C. 295, 359) in which the equity in the road is transferred to the Coast Line. The importance of the underlying equity was recognized by the District Judge (R. 477-478), and the differing standards applicable upon the sale of that equity were recognized by the Second Circuit in *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.*, 161 F. (2d) 413, 420 (C. A. 2), cert. den. 331 U. S. 858.

b. The Coast Line Securities to be Given in Exchange

A bondholder is entitled to "a comparison of the new securities allotted to him with the old securities which he exchanges to determine whether the new are the equitable equivalent of the old" (*Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523, 566). In an internal reorganization, the value of both old and new securities is based on the earning power of the underlying property. If, upon a sale, the value of what the bondholders yield is to be based on future earning power, as has been done in the present case, then the value of what they receive in return, the new Coast Line securities, should also be based on future earning power. *But no estimate of Coast Line earning power has been made* (267 I. C. C. 295, 353-354).

The Commission has apparently valued the new securities simply on the basis of the Coast Line's past operating results (although its margin of profit admittedly rests largely on dividends from Louisville and Nashville stock which the Commission thought should be discounted (267 I. C. C. 295, 352) and upon certain statistical estimates of prospective market values and annual returns found in an appendix to a Coast Line brief (267 I. C. C. 729, 736-737, 740). In order to justify such a cursory comparison of values, the Commission as much as said that whatever the worth of Atlantic Coast Line securities, most of the bondholders were bound to make a profit because of the depreciated price at which they had bought their bonds (267 I. C. C. 729, 736-738). The District Judge ruled out this finding as an improper criterion of equitable equivalence (R. 478) and the correctness of his ruling is long established law. See, e.g., *Wade* v. *Chicago, Springfield, etc., Railroad*, 149 U. S. 327, 343-344; *Standard Gas & Electric Co.* v. *Deep Rock Oil Corp.*, 117 F. (2d) 615, 619 (C. A. 10), cert. den. 313 U. S. 564.

We submit, then, that the bondholders are entitled to reconsideration of the plan, even if no other objection is valid, to have the Commission test and ascertain the value

of the compensation offered by the same standard used to value the property which they are compelled to give up.

2. The Adequacy of Compensation

Assuming that the capitalization of $40,500,000 is a fair sale price, we question whether the allocation to the bondholders of $40,500,000 in face value of cash and inferior securities of the Coast Line affords "full compensatory treatment" (*Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624, 634, ftn. 14) or "the full economic equivalent of what they presently hold" (*Schwabacher* v. *U. S.,* 334 U. S. 182, 199). We fail to see how the Bondholders have received better treatment in this plan than the General Mortgage Bondholders received in the *Milwaukee* plan which was remanded to the Commission by this Court on the ground that:

> "Since junior interests are participating in the plan, the Commission and the District Court should determine what the General Mortgage bonds should receive in addition to a face amount of inferior securities equal to the face amount of their old ones, as equitable compensation, qualitative or quantitative, for the loss of their senior rights" (*Group of Investors* v. *Milwaukee R. Co.,* 318 U. S. 523, 571).

Petitioners argue that no junior interests are involved because they limit the application of the absolute priority rule to the classes of security holders in an internal reorganization, thereby excluding the Atlantic Coast Line. This is a technical argument deserving the technical answer that the Coast Line *is* a junior interest; it is an unsecured creditor. The answer of substance is, however, as made by the Dissenting Commissioners (267 I. C. C. 295, 390-391), that the Coast Line is a stranger to the proceedings who will without justification reap the benefits of any inadequate allocation of new securities to the Bondholders.

a. Quantitative Allocation

Even if $40,500,000 could be called the fair value upon a sale to Coast Line of that which is available for the satisfaction of the Bondholders' claims, the proposed allocation of cash and new securities is admittedly worth much less (267 I. C. C. 729, 737). The difference goes to the Coast Line in violation of the principle behind, if not the literal terms of, the absolute priority rule. This was the opinion of the dissenting Commissioners (267 I. C. C. 295, 390-391; 267 I. C. C. 729, 745-746) and of the District Judge (R. 479-480).

Moreover, the discrimination against senior lienholders in favor of a junior claimant by offering securities equal only in face value to the lienholders' claim is the very defect which led the District Court to disapprove the plan in the case of *In re Chicago, R. I. & P. Ry. Co.*, 50 F. Supp. 835, 856 (D. C., Ill.), and the principle involved is approved by this Court in *Insurance Group Committee* v. *Denver & R. G. W. R. Co.*, 329 U. S. 607, 618, and in *Schwabacher* v. *U. S.*, 334 U. S. 182, 199.

b. Qualitative Allocation

Even if the proposed allocation of cash and securities could be held to give the Bondholders "the equitable equivalent" in quantity of that which is available for the satisfaction of their claim, it fails to recognize and compensate for the quality of the rights which they are forced to surrender. "The important element is the allocation of the securities so as to preserve to creditors the advantages of their respective priorities" (*Ecker* v. *Western R Co.*, 318 U. S. 448, 483).

Giving lip service at least to the right of the Refunding Bondholders to recoup as equity owners of an independent debtor their losses from future earnings, the Commission allocated two shares of redeemable preferred stock to each bond with participation rights as to dividends in excess of $4 per share on Atlantic Coast Line common stock (267

I. C. C. 376, 753). The District Court ruled the preferred stock to be illusory compensation since it could be redeemed if good years ever made the participating provision worthwhile (R. 480).

This ruling on the inadequacy of compensation for loss of equity rights is identical in scope with this Court's ruling on the loss of seniority rights in *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 571. (See also *Consolidated Rock Co.* v. *DuBois*, 312 U. S. 510, 529).

3. Changed Conditions

Before the District Court, the Lynch Interests introduced evidence of changed conditions enhancing the earning capacity of the debtor (Lynch Exs. 1-32). This carefully prepared material was presented by a qualified railroad expert (R. 227-230) whose cross-examination by counsel for the Atlantic Coast Line and redirect examination only served to emphasize the abundance of new material which had not been presented to the Commission (R. 275-279, 283, 286, 287).

The District Judge ruled:

> "I am impressed that evidence produced before me, if it had been before the Commission, might have produced a different result" (R. 479).

Such a ruling falls squarely within the authority of the precedents:

> *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 518, 542;
> *In re New York, New Haven & Hartford R. Co.*, 147 F. (2d) 40, 46 (C. A. 2), cert. den. 325 U. S. 884;
> *In re Missouri Pac. R. Co.*, 50 F. Supp. 936, 943.

There can be no question of interference with the Commission. The Judge merely determines on the basis of the record before him whether there is enough new material to render reconsideration by the Commission desirable. If

there is evidence in the record to support his determination, this Court has been reluctant to interfere with his informed discretion (*Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 564).

At page 31 of their brief, petitioners imply from our failure to have recourse to Section 3(a)(3) of the Mahaffie Act a fear of presenting the evidence of changed conditions to the Commission. They forget that our purpose in opposing certiorari is solely to return the plan to the Commission at once for further consideration.

POINT III

Conclusion

Petitioners seek review of that part of the action of a District Judge which has been approved by a Court of Appeals. The District Judge made three rulings, each of which is sufficient by itself to sustain his order. The first two were, for the purpose of a petition for certiorari, eliminated by the Court of Appeals, leaving for consideration by this Court the one ruling on the fairness and equity of the plan.

That ruling the District Judge made only after explicit limitation of his functions (R. 474) within the framework of review approved by this Court (supra, pp. 8-9) and only after careful consideration of the record made before him and the Commission. His determination to return the plan for reconsideration of the treatment accorded the Bondholders finds full precedent in the action of other District Judges reviewing plans.

See, e.g.:

In re Chicago, Rock Island and Pacific Ry. Co., 50 F. Supp. 835, 856 (D. C., Ill.) (failure of proposed new securities to give full compensation for first lien claim);

In re Missouri Pacific Railroad Company, 50 F. Supp. 936, 943 (D. C., Mo.) (changed conditions and failure of Commission to consider compensation for loss of preferred position);

In re Denver & Rio Grande Western R. R., 38 F. Supp. 106, 120 (D. C., Colo.) (insufficient distribution to prior lien bonds, inter alia);

In re Louisiana & N. W. R. Co., 36 F. Supp. 636 (D. C., N. Y.) (failure to provide income bonds as part of new capitalization);

In re Florida East Coast Railway Co. (unreported—D. C., Fla.; see R. 690-697) (unallocated wartime earnings).

The Court of Appeals for the Fifth Circuit, finding warrant in the record below for the District Judge's decision and finding compliance with the statutory standards of Section 77(e), properly refused to interfere with the legitimate exercise of his discretion (R. 945) in determining the fairness and equity of the plan. For similar action in other circuits, see, e.g.:

In re New York, New Haven & Hartford R. Co., 147 F. (2d) 40, 47 (C. A. 2), cert. den. 325 U. S. 884;

In re Denver & R. G. W. R. Co., 150 F. (2d) 28, 36 (C. A. 10), rev. on other grounds 328 U. S. 495;

Chicago, R. I. and P. Ry. Co. v. *Fleming,* 157 F. (2d) 241, 244 (C. A. 7), cert. den. 329 U. S. 780.

The decision of the District Court, as affirmed by the Court of Appeals, does not force petitioner Atlantic Coast Line out of the reorganization nor require petitioner 5% Deposit Committee to sacrifice a single right of its Bondholders. The petition for certiorari reveals no miscarriage of justice, and, since it cannot be said that the District Judge overreached his powers or abused his discretion, presents no suitable question for review by this Court.

Group of Institutional Investors v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.,* 318 U. S. 523, 564.

We pray, therefore, that a writ of certiorari be denied.

Respectfully submitted,

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Dated: March 10, 1950.

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Supreme Court of the United States

OCTOBER TERM, 1949

ATLANTIC COAST LINE RAILROAD COMPANY, et al. *Petitioners,* vs. ST. JOE PAPER COMPANY, et al., *Respondents.*	No. 601

REPLY BRIEF OF RESPONDENT F. K. CONN TO PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT

I.

The Petitioners Have Misinterpreted the Decisions of This Court with Respect to the Respective Functions of Court and Commission under Section 77.

In the petitioners' statement of the questions (Petition, p 3) and the discussion of those questions (pp 16-22), there is a clear misapprehension of the purport of the decisions in both the District Court and the Court of Appeals; and there is an equally clear misunderstanding of the decisions of this Court on the subject. We believe that we can best demonstrate this statement by a positive approach:

(1) The decisions of this Court are clear and unmistakable in deciding that Section 77 of the Bank-

ruptcy Act gave the District Court definite discretionary authority in connection with the approval or disapproval of reorganization plans.

(2) The District Court correctly interpreted and applied the decisions of this Court.

(3) The majority in the Court of Appeals correctly decided that the District Court properly exercised the discretionary authority of disapproval.

If the above statements are correct, then there is no necessity for granting certiorari merely for the purpose of further demonstration, and the writ should be refused.

1. Under the decisions of this Court, the District Court has discretionary authority with respect to certain functions in the approval of a plan.

These areas of judicial authority were thoroughly examined in *Ecker v. Western Pacific R Corp.*, 318 US 448 and *Group of Institutional Investors v Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 US 523, as stated in the Petition (p 16). But it is incorrect to say, as does the petition (pp 16-17), that "the holdings in the *Western Pacific* and *Milwaukee* cases were summarized in the first *Denver* case (328 US 509):

> 'To the Courts, Congress confided the power to review the plan to determine whether the Commission has followed the statutory mandates of subsection (e), 318 US at 477, and whether the Commission had material evidence to support its conclusions. 318 US at 477; concurring opinion at 512'."

For it is apparent from a reading of the *Denver* case and the citations referred to in the quoted sentence, that this Court was referring *only* to the function of *valuation*—that is, the quoted sentence refers only to the

fourth paragraph of Section 77(e) (Petition, appendix iii) and *not* to Section 77(e) as a whole.

With regard to Section 77(e), this Court has determined, principally on the basis of its legislative history, that the Bankruptcy Act reserved certain functions to the District Court, comparable to those it exercised in equity receiverships, and which it presumably should perform in the same manner:

> "The first bill was introduced in the House January 21, 1933, as H. R. 14359. It was drafted so as to place 'the entire plan of reorganization under the jurisdiction, supervision and control' of the Commission. After Commission approval, which followed stockholder and creditor approval, it was to transmit the 'approved plan, its findings and the record to the court. The court's review must be based upon the record made before the Commission.' This substitution of the Commission for an equity receivership under court direction was criticized and amendments suggested to 'eliminate all confusion in regard to the functions to be exercised by the Commission and by the court . . and [to] remove the most fundamental objections to the bill in its present form.' Nothwithstanding the criticism the bill passed the House with the power lodged in the Commission, as originally proposed. When the House bill for the relief of debtors was reported by the Senate Committee, the railroad section was omitted. By a motion from the floor it was reinstated but in a changed form. *The Senate adopted changes designed to give more power to the court.* 76 Cong. Rec. 4907, 5104-34. Hearings before the court were provided. The judge, it was added, was to be 'satisfied that (1) the approved plan complies with the provisions of subsection (b) of this section, is equitable and does not discriminate unfairly in favor of any class of creditors or stockholders.' These amendments giving concurrent powers to the

court were adopted by the Senate and accepted by the House and the bill became the Act of March 3, 1933, 47 Stat 1474, c 204, 11 USCA § 205, 3 FCA title 11 § 205.

"Following the recommendation of the President in his message of June 7, 1935, the Congress adopted amendments to the 1933 act which were in line with the suggestions of the Federal Coordinator of Transportation and the Commission. While the most important amendment was to furnish means to avoid the obstruction of dissatisfied classes of creditors or stockholders by making a fair and equitable plan effective over dissenters, the requirement of coordinated action by Commission and court was retained." (emphasis supplied) *Ecker v. Western Pacific R. Corp.* 318 US 448, 469-471, 87 L ed 892, 930-931.

Participation of both court and the commission or other regulatory body in equity reorganizations was not uncommon (see discussion, Tracy, *Corporate Foreclosures,* pp 346-348). The 1933 Act principally changed the burden of the preparation of the plan and the manner of its submission to court, commission and creditors for approval. Certainly there is no authority for the suggestion that the 1933 Act changed the ordinary meaning of the words "if satisfied" as applied to the Court's determination necessary to its approval.

These words were not new to equity receiverships, and they were not new to bankruptcy law. The same statement appeared, for example in Section 12 of the Act of 1898 (11 USCA § 30) relating to confirmations of compositions:

"(d) The judge shall confirm a composition *if satisfied* that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and

(3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden." (emphasis supplied).

This section was revised into separate chapters by the *Chandler Act* (52 Stat. 840), and comparable statements concerning Real Property Arrangements, (Chapter XII), Wage Earner Arrangements (Chapter XIII) and Arrangements generally (Chapter XI) appear as Sections 467, 472, 656, 361 and 366, respectively, of the present *Bankruptcy Act* (11 USCA 867, 872, 1056, 761, 766).

There has never been any doubt that the words "if satisfied" in those sections mean what they say—that is, that the Court, exercising a discretionary judicial function, must find the facts to support his prescribed action, or in the absence of such finding, disapprove the plan.

"While consent to a bankrupt's offer of composition by a majority of his creditors in number and amount is evidence that it is for their best interest, In re Waynesboro Drug Co. (D.C.) 157 F. 101; In re Hoxie (D.C.) 180 F. 508; In re Barde (D.C.) 207 F. 654, and therefore properly to be considered by the judge in passing on the question, such evidence being only prima facie is not controlling upon him for, after all, it is upon the judge that the Bankruptcy Act places the duty of deciding whether the offer is for the best interests of the creditors, and this independently of their favoring a composition. Cases supra. Such a decision rests wholly within his discretion. This court will not on appeal disturb the action of a district judge based on his discretion unless it clearly appear that he has abused his discretion or has grounded his action on a plain mistake of fact."

In re Youtie (CCA 3), 44 F 2d 56

A comparable provision also appears in Chapter X (and previously in Section 77 (B)) of the Bankruptcy Act, applicable to the Court's confirmation of plans under that Chapter (Section 221, 11 USCA § 621). "The judge shall confirm a plan *if satisfied . . .* " concerning five designated subjects. Under that wording—

> "The approval of the plan, if authorized by the necessary number of creditors, is a matter which must lie largely in the discretion of the trial court, with which discretion we should be very reluctant to interfere, and indeed would have no power to do so except in the case of plain abuse of discretion, which is not shown in the case at bar."
> *In re Pilsener Brewing Co.,* (CCA 9, 1935) 79 F 2d 63, 68.

> ". . . the matter which we are asked to review is the action of the court in approving the plan. The court found the plan to be fair and equitable. We can not say that the plan proposed by appellant is more fair and equitable than the plan proposed by the committee. The lower court, well acquainted with all the facts bearing upon that question, and hence peculiarly well qualified to determine the comparative fairness of the two plans, has found in favor of the committee's plan, and specifically found that, 'The alternative plan submitted by Scherck, Richter Company is not fair and equitable, and does not afford due recognition to each class of holders of certificates of deposit and creditors, stockholders and holders of voting trust certificates of Ambassador Building Corporation.'
>
> "The question presented to the lower court was under the circumstances disclosed by this record, a question of business policy calling for the exercise of business judgment. Its decision should not be disturbed in the absence of an abuse of discretion.

Warner Bros. Pictures v. Lawton-Byrne-Bruner Ins. A. Co., [79 F 2d 804]; Kansas City Terminal Ry. Co. v. Central Union Trust Co., 8 Cir., 28 F. 2d 177; Mercantile Trust Co. v. Farmers' Loan & Trust Co., 8 Cir., 81 F. 254; Reconstruction Finance Corp. v. Kentucky River Coal Corp., 6 Cir., 114 F. 2d 942."

Scherck Richter Co. v. Dysart, (CCA 8, 1941) 123 F 2d 364, 369

This Court in *Ecker v. Western Pacific R. Corp.,* 318 US 448, 510, specifically affirmed the opinion of the District Court, and approved the functions of that court, which it described as—

"Upon the other findings [than valuation and the amount and character of the capitalization] of the Commission, the District Court exercised an independent judgment based upon the record and the findings of the Commission together with additional evidence produced before the court by the parties. 34 F Supp 493, 505." (at 467)

In that case the District Court included, among its other determinations, the following:

"The determination of the questions relating to the distribution of the new securities, including legal priorities and allocations, involves private rights and is a judicial function, within the province of the court. However, since these private property rights had not been adjudicated, it became the duty of the Commission to determine them preliminarily for the purpose of considering the plans before it. 230 I.C.C. 61, 97. Without such consideration and determination, it would have been impossible for the Commission to have complied with the statute and certified a plan to the court. While the decision of the Commission in the premises is advisory only, it was of inestimable value to the court in enabling it to see the whole picture and arrive at a decision."

In re Western Pac. R. Co., 34 F. Supp. 493, 504.

And in *Institutional Investors v. Chicago M. St. P & P.*, 318 US 523, this Court specifically declined to overturn the discretionary act of the *District Court* (not the Commission) in approving an allocation of securities.

> "No fixed rule supplies the method for bringing two divisional mortgages into a new capital structure so that each will retain in relation to the other the same position it formerly had in respect of assets and of earnings at various levels. The question in each case is one for the informed discretion of the Commission and the District Court. We cannot say that that discretion has been abused here.
>
> *"We would have quite a different problem if the District Court had failed to perform the functions which* § 77 (e) *places upon it.* But it cannot be said that there was any such failure here. The District Court satisfied *itself* that the principles of priority as applied to these facts were respected. See 36 F. Supp pp. 202, 203, 211, 212. Since such a determination rests in the realm of judgment rather than mathematics, there is an area for disagreement. But we are not performing the functions of the District Court under § 77 (e). Our role on review is a limited one. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end." (emphasis supplied) (at pp 563-564)

In this respect, Mr. Justice Roberts in dissent considered that the majority opinion had gone too far. "The opinion of the court treats this question as, in effect, lying within the sound discretion of the district judge and refuses to review his action on the ground that it is not evident he abused that discretion." (at p 577) But the majority opinion is still the rule of this Court.

2. The District judge correctly applied the decisions of this Court.

It is evident that the Judge Designate was acquainted with his duties, and followed the statutory functions assigned to him (R 472-475); and he properly considered that he should "independently consider those matters which the statute requires me to be satisfied about, in the light of the new evidence concerning them" (R 475).

Having given independent consideration to such matters, the Judge Designate drew his conclusions, and among them:

> "I conclude also that the plan is not fair and equitable and does not afford due recognition to the rights of the refunding bondholders." (R 479)

There is a wealth of evidence to support such a finding, but two points raised by the Court are sufficient:

> (1) The Coast Line, "an unsecured creditor [but] . . . really a stranger in interest" is getting the railroad, while the old security holders are receiving new securities of dubious present value. (R 479) "The very aggressiveness of the Coast Line in proposing and defending this plan indicates that the Coast Line thinks it is getting a bargain; that what it gets is not the mere equivalent of what it pays, but much more." (R 480) This is obviously a violation of the absolute priority rule.
>
> (2) The subservience of the rights of minority Bondholders to the exigencies of the struggle between the Coast Line and St. Joe Paper Company as a majority bondholder, which requires that "all must sell their equitable rights in this property, and must take in exchange that which is not money and which they do not desire to have . . . [is] unfair,

inequitable, and not a due recognition of their rights." (R 478)

The error of the petitioner Atlantic Coast Line seems to be in a failure to recognize its own position in this controversy. It seems singularly naive to seriously suggest that, because it has no interest in the proceedings, the fact that it is to receive the entire railroad property, rather that an allocation of the available securities, is no violation of the absolute priority rule. It is, in fact, the ultimate infraction of the doctrine. Whatever the "covetous one" (R 943) gets is obviously misallocated out of the total. And the allocation is peculiarly the discretionary function of the court, and not of the commission.

3. The majority in the Court of Appeals correctly interpreted the law and affirmed the District Court's order.

Judge Hutcheson's analysis of the case closely followed the points in the Judge Designate's opinion referred to above—it was he who correctly stigmatized the Coast Line as the "covetous one" (R 943).

And the majority also correctly analyzed the functions of the court in allocating the properties of the debtor. "It is quite clear, too, that, in reviewing the findings of the trial judge upon such a record, it would be our duty to accord full weight to his conclusions that the plan was not fair and unless they are found, as a matter of law ,to be wholly wrong, or, as matter of fact, to be clearly erroneous, these conclusions and the order based on them should be sustained." (R 945)

The point that the Court of Appeals majority and the trial judge made, and which the Coast Line has, so

far, seen fit to ignore, is that, in this case, the allocation of the properties of the debtor (a judicial function—*Milwaukee* case at 564; concurring opinion in *Ecker v. Western Pacific* at 513-515) entails more than the mere distribution of the Coast Line securities to the Florida East Coast bondholders. *It also involves the allocation or distribution of the physical properties of the Florida East Coast to the Coast Line.* And if, as both the trial court and the appellate court found, that distribution represented the receipt by the Coast Line of something of value (R 479-480; R 947), then there was a misallocation of the debtor's property and the plan was properly disapproved.

This leaves nothing for this Court to review; for under similar circumstances this Court has held:

> "The findings to that effect are entitled to special weight where, as here, they are based on the District Judge's complete familiarity with the case. *Reconstruction Finance Corp. v. Denver & R.G.W. R. Co.*, 328 US 495, 533, 90 L ed 1400, 1423, 66 S Ct 1282. Affirmed by the Circuit Court of Appeals, *they are, under the rule concerning concurrent findings, and on the basis of our grant of certiorari, conclusive in this Court.*" (emphasis supplied)
>
> *Comstock v. Institutional Investors,* 335 US 211, 230; 92 L ed 1911, 1924.

II.

There is Neither Private nor Public Interest in This Case Warranting the Grant of Certiorari.

The Coast Line, a "railroad company coveting, and pressing to possess, a competing debtor railroad company" (R 943) and "its small but faithful ally, the Deposit Committee" (R 939) ask this Court to grant certiorari. The brief does not clearly set out in which

respects they consider that the trial court and the court of appeals erred as to the facts, and to what extent the error was one of law. If the error, supposing there was one, was an error of law, then it is not stated in what manner the error of law was prejudicial to the private interests of the petitioner.

In this respect, the Coast Line is apparently in a dilemma. If it admits that under the plan it would receive property of a greater value than the securities which it transfers in exchange, then it admits that there has been misallocated to it, a portion of the properties of the debtor. If, on the other hand, under the proposed plan, it was to have transferred securities of a greater value than the property which it received, then the decisions of the trial court and the court of appeals are actually favorable to it and it is in no wise aggrieved. This latter result, of course, seems unlikely, particularly in view of the fact that, as the trial judge found, "no one would contend that the Coast Line could be forced" to complete the transaction (R 476).

In any event, there seems to be no possible way for the Coast Line to show that it is aggrieved without also showing that if the decision were to the contrary, the bondholders would have their property taken for the benefit of the Coast Line, without just compensation (R 944).

As to the Deposit Committee, it is difficult to understand their position except on the basis of the misplaced loyalty that the court of appeals suggested. (R 942, 939) The court of appeals, in effect, found that the bondholders were not receiving all that they were entitled to, and that the case should be returned to the Commission, in accordance with the decision of the trial judge, "for the purpose of working out a really fair and equitable

plan, and without prejudice to a fair acquisition by the Coast Line." (R 948) It is difficult to see how the bondholders of the Deposit Committee could be damaged by the probability of receiving greater value for their securities. One of the primary purposes of the reorganization procedures in the Bankruptcy Court was to avoid such strikes against the opinion of the vast majority of a creditor group by creditors holding relatively insignificant interests.

Nor does there appear to be any significant public interest involved in this case. The term "public interest" refers to the interest of the public generally, and the importance of the question of law which is to be decided by the court if the writ of certiorari is granted. The petition has not suggested any great public interest in the principle of law here to be decided. Quite apart from the fact that the Supreme Court of the United States has already decided all questions of law involved in this case, as we have pointed out above, the importance of any question involving railroad reorganizations is largely past. The significant cases have already gone before the Supreme Court of the United States, some of them more than once, and have been returned to the District Courts and the Commission, where the reorganizations have been confirmed and completed. This case is one of the few which remains before the courts out of the multitude earlier involved in bankruptcy or reorganizations. On October 23, 1939, there were 61,292.69 miles of railroad in bankruptcy proceedings under Section 77, including lines in 29 states. About one-quarter of the railroad mileage of the country was then in bankruptcy (*Palmer v. Massachusetts,* 308 US 88-89, n 16; 84 L ed 100).

As of June 30, 1949, there were only 29 railroad reorganizations in the courts in the entire United States.

Of these at least 25 were over one year old and had presumably, for the most part, passed the phase in which this reorganization bogged down (*Tables of Bankruptcy Statistics,* fiscal year ended June 30, 1949, Administrative Office of the United States Courts). A decision in this case is unlikely to have any important effect on any other railroad reorganization, even if there were some error in the facts or in law in the decision of the court of appeals. And before another crop of railroad reorganizations appear before the courts, it seems probable that the statute may be significantly changed.

Further, both the court of appeals (R 943), and the trial court (R 478-480) found that as this case was handled by the Interstate Commerce Commission, it degenerated into what was largely a private battle between two powerful financial groups, those in control of the Atlantic Coast Line Railroad Company, (presumably the Safe Deposit and Trust Company of Baltimore group (R 312)) and the St. Joe Paper Company, and its underlying owner, the Alfred I duPont Trust Estate (R 313-314). The trial judge significantly found that in the course of this conflict, the rights of other bondholders were subordinated to the private struggle (R 478).

Insofar as the action taken by the district court and the court of appeals is concerned, there has been merely a solution of the private conflict between the Atlantic Coast Line and the St. Joe Paper Company. Furthermore, under the decision of the court of appeals, (R 948) the solution is one which deprives neither of these contestants from a reassertion of their interest, if any, in a fair reorganization. If the Atlantic Coast Line Railroad Company considers that it can act fairly in a reorganization, that is, if it desires to become a purchaser at a fair price to the bondholders, it can make its bid when the

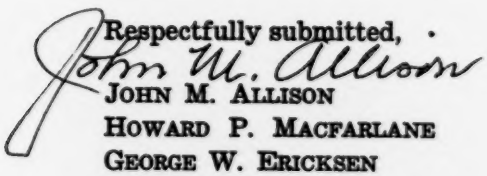
Interstate Commerce Commission is again attempting the formulation of a fair and equitable plan. The St. Joe Paper Company has an equal right to act, subject to the suggestion by the district court (R 480-481) that it may have to subordinate its ownership interests to a direction and control by some more impartial operating organization.

CONCLUSION

We respectfully submit that, in view of the fact that there is no substantial public interest which would warrant the granting of the writ, and in view of the fact that the petition patently relies on a misinterpretation of former opinions of this court, the writ of certiorari should be refused.

Dated March 11, 1950.

Respectfully submitted,



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

ATLANTIC COAST LINE RAILROAD COMPANY and the DEPOSIT COMMITTEE for First and Refunding Mortgage 5% Bonds of Florida East Coast Railway Company due 1974,

Petitioners.

vs.

ST. JOE PAPER COMPANY, ET AL.,

Respondents.

On Petition For a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT
St. Joe Paper Company, in Opposition

This petition seeks to vacate an order entered by the District Court for the Southern District of Florida (81 F. Supp., 926) and upheld by the Fifth Circuit Court of Appeals, (Unreported as yet), by which a plan of reorganization of the Florida East Coast Railway Company under Section 77, proposed and submitted by the Interstate Commerce Commission, was disapproved.

In brief, the Petitioners assert that the District Court's opinion proceeded upon an unwarranted application of the powers of the Court over a plan of reorganization certified to the Court by the Interstate Commerce Commission in proceedings under Section 77. They aver that such application conflicts with the decisions of this Court in *Ecker v. Western Pacific R. Co.*, 318 U. S. 448, and *Institutional Investors v. Chicago etc., R. Co.*, 318 U. S. 523.

SUMMARY OF PROCEEDINGS

The background of the proceedings, giving rise to this controversy, covers a long period of time and is not easily summarized.

(a) Description of the Debtor and its financial situation.

The debtor in reorganization, Florida East Coast Railway Company, owns and operates a railroad running from Jacksonville to Miami, both in Florida. It has always been independently owned and independently operated. Its line is double-tracked, has been recently re-railed and is in excellent condition. Its rolling stock is modern in every respect. Its management is experienced and capable. Such railroad, all parties concede, has been efficiently operated and has rendered adequate and satisfactory service under its independent management. Operating through one of the most populous areas of the United States, it has but one rail competitor, the Seaboard Air Line Railway Company. At its terminus in Jacksonville, it connects with the Atlantic Coast Line Railroad, the Southern Railway and the Seaboard.[1]

The financial setup of the debtor is comparatively simple. Ahead of its common stock are but two mortgage debts. The first—in the amount of $12,000,000—is embraced in an issue of four and one-half percent mortgage bonds; the second represents an issue of $45,000,000 five percent mortgage bonds. There is no controversy over priority of liens between the two bond issues. The first mortgage debt has

[1] The Commission said in discussing the efficiency of operations of the debtor and that likely under the disapproved merger (R., Vol. I, p. 321):

"As to the promotion of efficiency of transportation services generally by reason of improvements in the physical properties of the two carriers, the record does not furnish a basis for a conclusion that it would be materially affected whether the debtor's properties are operated independently or as a part of the Coast Line."

At page 322, Vol. I, R., the Commission quotes counsel for the Coast Line to this effect:

"Mr. Bourne (principal counsel for the Coast Line): We do not take the position, and have never taken the position, that the Florida East Coast is not an efficiently operated railroad today for an independent railroad. Our position is that a single-line operation of the two roads would be in the public interest."

See, also, R., Vol. I, pp. 425-6 and 321.

never been in default. Interest on the second mortgage debt went into default in the early thirties. Unpaid interest on such debt now amounts to about $35,000,000. See Appendix A, R., Vol. III, p. 660.

(b) Institution of receivership and reorganization proceedings of the debtor.

Shortly after initial default on the second mortgage debt, the railroad was placed in receivership. This receivership continued until 1941, when the present proceeding in bankruptcy was filed under Section 77 in the Federal Court for the Southern District of Florida. See Note 1, R., Vol. III, p. 529.

(c) Proceedings before the Interstate Commerce Commission.

Immediately upon the filing of this bankruptcy proceeding, a Deposit Committee for the First and Refunding five percent bonds, composed primarily of representatives of New York banks and national insurance companies, submitted a plan of reorganization of the debtor, which, in turn, was referred to the Interstate Commerce Commission for consideration. R., Vol. III, pp. 529-30, Vol. II, p. 321. This plan assumed that the permissible capitalization of the debtor was less than the amount of the two mortgage debts and that the real owners of the equity in the debtor were the First and Refunding bondholders. R., Vol. III, pp. 539-42. While such plan was under consideration by the Commission, the so-called duPont interests, represented here by the respondent, St. Joe Paper Company, submitted an alternative plan of reorganization, under which the first mortgage debt would have been undisturbed, the second mortgage creditors would have received for their interest new bonds and common stock of the reorganized debtor, and additional common stock would have been sold at par for cash to the duPont interests to secure new money to finance the needed improvements of the debtor's road. This additional common stock, to be sold for cash under the alternative plan, would have amounted to about fifty percent of the outstanding equity capital of the debtor. R., Vol. III, pp. 543-8.

This alternative plan of the duPont interests was vigorously assailed by the five percent committee because it would have involuntarily transferred control of the debtor from the First and Refunding bondholders—who were, it contended, the real owners of the equity in the debtor—to the duPont interests in violation of the constitutional and equitable rights of such bondholders. R., Vol. I, p. 439. Vol. III, pp. 550-1. In its First Report in this proceeding (filed April 6, 1942), the Interstate Commerce Commission unanimously upheld this position of the Committee that it would be alike illegal and inequitable to divest the First and Refunding bondholders of their right of control and their equity and disapproved the alternative plan. R., Vol. III, pp. 564, 578. Under the plan approved by the Commission at this time, the valuation or "permissible capitalization" of the debtor was fixed at approximately $37,000,000. R., Vol. III, p. 576. The first mortgage debt was not to be disturbed, though provision was made for the issuance of $6,000,000 additional fixed interest first mortgage bonds to finance improvements of debtor's line or a total of authorized fixed interest debt of $18,000,000. R., Vol. III, pp. 589-92. The First and Refunding bondholders were to receive all remaining capitalization, divided into income bonds and common stock. All unsecured indebtedness of and the stock in the debtor were found worthless. This plan, which recognized and gave effect to the ownership of the equity in the debtor by the First and Refunding bondholders, was certified to the District Court for approval.[3]

At this point in the proceeding, the duPont interests purchased from the banks and insurance companies, whose representatives composed the five percent committee, their bonds and thereby became the owner of a majority of the First and Refunding bonds. R., Vol. I, pp. 152-3. Since that time, the Committee has claimed the right to represent an insignificant number of bonds, the owners of which apparently are not readily available or had refused to follow

[3] In this Report, the Commission said that "we find that, within the recommended permissible capitalization and annual charges, the first and refunding mortgage bond-holders are entitled to the entire equity in the property remaining after satisfaction of prior indebtedness." R., Vol. III, p. 586.

the Committee's recommendation that they sell their bonds to the duPont interests. R., Vol. II, pp. 353-4.

Before this first plan of reorganization was submitted to the District Court, there was a substantial improvement in the financial condition of the debtor. The Court accordingly disapproved the plan and remanded the proceedings to the Commission. R., Vol. I, pp. 151-2.

When the Commission resumed its hearings upon this recommital, all parties agreed—including the Safe Deposit Trust Company which owns control of the Atlantic Coast Line—that duPont control was in the public interest. See R., Vol. I, pp. 153-4, 185, 347, 372; *Atlantic Coast Line R. Co. Purchase,* 261 I. C. C. 820. The only plan considered was one which provided for (1) the use of most of the available cash, accumulated from earnings of the debtor, to pay off in full the first mortgage debt and to defray about $8,000,000 in improvements, and (2) the distribution of the permissible capitalization of the debtor, consisting of bonded debt and stock of the reorganized debtor among the First and Refunding bondholders, whose debt exceeded considerably the "permissible capitalization" of the debtor. R., Vol I, p. 173. After the hearings on this new plan of reorganization had been concluded, S. A. Lynch, the owner of certain First and Refunding bonds—following negotiations with the Coast Line—filed a petition to reopen the hearing in order to permit the filing of an alternative plan under which control of the debtor would pass to the Coast Line. It was to permit the filing of a supporting brief to this petition of Lynch that the Coast Line was allowed to intervene. R., Vol. III, p. 747. Under this alternative plan, the debtor would have issued certain bonds and preferred stocks, all of which would have been received and held by the First and Refunding bondholders, and $6,000,000 par value common stock, of which the bondholders would have been obligated to sell $3,600,000—that is, control of the equity—to the Coast Line for cash at par. R., Vol. I, pp. 187-93. This was much the same proposal submitted by the duPont interests at the time of the consideration of the first plan of reorganization.

Again, this new attempt to take from the First and Refunding bondholders the control and ownership of the debtor was promptly rebuffed by the Commission, which said in its unanimous opinion (R., Vol. I, pp. 191-2):

> "The proponents of the Lynch plan contend that the sale at a price of $100 per share of 60 percent of the common stock allotted to the first and refunding bondholders would represent the full value of the stock based on the total capitalization provided for in the plan and that the owners of the stock therefore would receive full compensation for the surrender of their shares and would have no legal right to complain. We are not convinced by this argument. All the securities to be issued under the plan taken at par will fall far short of satisfying the amount of the claim of the first and refunding bondholders. If, in the view of such bondholders, the prospects of future earnings or the control value are such that the stock later may have a market value in excess of par, and they desire to hold the stock to realize the higher price, they should be at liberty to do so, as they would not be reimbursed in full on their claim by accepting $100 per share for stock representing a part of their share of the debtor's estate."

It will be noted that thus, in two separate and unanimous opinions—one entered in 1942 and the other in 1945—the Commission had found that it was both illegal and inequitable to transfer involuntarily—even for a consideration—the railroad away from the First and Refunding bondholders, that such bondholders were entitled to own and control the railroad and that they had the legal and equitable right to receive, without dilution through forced sale to any other interests, all future enhancement and appreciation in the value of the property.

After the filing of this Second Report of the Commission, the Coast Line, discarding Mr. Lynch and flanked by Senator Pepper appearing as "Senator from Florida," filed petitions with the Commission, asking that the proceedings be reopened to permit the consideration of a pro-

posal to transfer the debtor to another carrier, obviously the Coast Line. After an oral hearing, at which Senator Pepper and representatives of the Coast Line were heard, the proceedings were reopened. R., Vol. I, pp. 295, 729; Vol. III, pp. 776-8.

In preparing for the reopened hearings, the Coast Line purchased two unsecured debts held by the Flagler Estate, which in its prior reports the Commission had found worthless.[1] These claims were acquired by the Coast Line admittedly to give it standing to propose in its own behalf a plan of reorganization for the debtor. R., Vol. I, pp. 147-9. Accordingly, when the hearings were reopened, the Coast Line in its new role of an unsecured creditor of the debtor submitted a new plan of reorganization under which the debtor would be "merged" with the Coast Line. Such merger, it was asserted, would achieve substantial savings for both debtor and the Coast Line, estimated at about $1,000,000 per year; and it was this claim of savings through unification that was urged principally on behalf of the "merger".

This Coast Line plan of "merger" was bitterly opposed by (1) all the bondholders of the debtor appearing before the Commission and representing upwards of eighty percent of the outstanding First and Refunding bondholders, (2) the Railway Labor executives, (3) all connecting and competing rail carriers other than the Coast Line itself and (4) practically all the shippers to be served. The supporters of the merger were, of course, the Coast Line itself, Senator Pepper who appeared not as shipper, owner of bonds or representative of labor, but under the title of "Senator from Florida", and the moribund five

[1] The Commission said in this particular (R., Vol. I, p. 299):

"On October 18, 1945, shortly prior to the date upon which the Coast Line presented its plan, and about 3 weeks prior to the commencement of the reopened hearings, the Coast Line procured assignment to it of two claims on open account against the debtor, totalling $1,900.000, these claims being previously filed by Florida Coast Car Ferry Company and by the trustees under the will of Mary Flagler Bingham."

See, also, R., Vol. III, p. 747.

The Flagler Estate was the owner of all the common stock of the debtor. The validity of the unsecured debts of the debtor, acquired by its sole stockholder—especially as against other creditors—is open to serious doubt. *In re Loewer's Gambrinus Brewery Co.* (C.C.A.N.Y. 1948) 167 F., (2nd) 318.

percent committee, whose members had sold either for themselves or their own institutions all their bonds several years before and who were so disinterested that they have now only an "acting secretary." R., Vol. I, p. 352.

In connection with the hearings on this "merger" proposal, it was for the first time suggested in this proceeding that duPont or St. Joe Paper control of the debtor was against the public interest. R., Vol. I, p. 308. This suggestion did not come from shippers; it was not raised by the competitor carrier, the Seaboard; it was not charged by a bondholder. It was introduced by the Coast Line, which now sought to acquire the property away from its equitable owners, and by Senator Pepper. After a full hearing, the Examiner for the Commission, who took the testimony and observed the demeanor of the witnesses, filed his Report, reaffirming the previous determinations made unanimously by the Commission, including the determination that duPont control of the debtor was in the public interest.[4] Among other things, he found (R., Vol. III, pp 797-8):

> "The Commission should find and conclude that the Coast Line has not shown that its proposals for satisfaction of the claim of the debtor's first and refunding bondholders are fair and equitable and afford due recognition of the rights which they would

[4] This claim of incompatible public interest against duPont control was so tenuous that two previous unanimous decisions of the Commission had found duPont control actually in the public interest. Unlike the *Piedmont & Northern* proceedings (1928) 138 I. C. C. 363, referred to by the appellants at p. 10 of their brief, the objector is not the debtor's competitor, the Seaboard. In fact, the Seaboard sees improper monopoly extended in transferring the debtor to the Coast Line, thereby giving the latter complete control of the debtor's interchange at Jacksonville. Seaboard objects to Coast Line control; it welcomes duPont control. This is quite different from the Piedmont & Northern case, as we have said. See R., Vol. III, pp. 786-90. Moreover, the dominating stockholder of the Coast Line had previously taken the position in this proceeding that duPont control of the debtor was in the public interest. The suggestion that duPont estate owned a paper mill, together with a telephone line and small service railroad, located some three hundred miles from debtor's line hardly fits into the concept of the "commodities clause." It is true the duPont estate owns control of three banks located in cities served by the debtor's railroad and has two or three office buildings. This is a far cry from the situation required under the "commodities clause." Basically, the Coast Line rested its claim of incompatible public interest on the ground that the duPont Estate is a charitable trust which should not own control of a railroad. This argument overlooks the fact that the Coast Line itself is controlled by the Walters trust, which largely is a charitable trust. Such an argument would disqualify both duPont and Coast Line control.

be required to surrender, including the right to control and manage the reorganized company. While the Coast Line has stated that it will be prepared to give immediate consideration to any modification of the Coast Line plan or any other plan which the Commission may approve and which will provide for unification of the debtor with the Coast Line, the situation here involved as disclosed by the evidence, would not justify proposal by the Commission of a modified Coast Line plan which would have the effect of depriving the debtor's bondholders of their right to control the reorganized property and at the same time speculation as to whether its terms would be accepted by the Coast Line, such acceptance, being a necessary condition for the plan becoming effective. Particularly is this true if the Commission should find, as recommended herein, that a merger of the Coast Line with the debtor is not required in the public interest."

Upon exceptions to the Examiner's Report, the Commission, though adopting practically all the Examiner's statements of facts, reversed his findings based upon such statements and, in a sharply divided five to four opinion, found that a so-called "internal reorganization" of the debtor was impractical and approved, with some modifications, the Coast Line's proposed merger. Under this proposed merger, the debtor's equitable owners were to receive the permissible capitalization of the debtor (which was still fixed at $40,500,000),[4] in securities of the merged road of a par value of $36,375,000 and $4,125,000 cash. On the other hand, the Coast Line was to receive the

[4] The "permissible capitalization" authorized in this Third Report was most conservative. It will be recalled that in the First Report, the "permissible capitalization" was fixed roughly at $37,000,000. At that time the debtor had no real working capital and no funds to finance the railroad's rehabilitation. When this Third Report was filed, the debtor had spent millions on the improvement of its properties and still had a cash fund of $22,000,000—or cash of considerably more than one-half the previous "permissible capitalization." Despite this large amount of cash and substantial improvements in properties—one of which alone, it was estimated, would increase the debtors' normal earnings several hundreds of thousands of dollars yearly—the Commission increased the permissible capitalization of debtor but $3,500,000. Such conservative capitalization of debtor makes clearer the error of the Commission in refusing to examine the capitalization of the Coast Line in connection with its proposed "merger."

debtor's railroad free of lien, about $9,000,000 rehabilitation fund and $3,100,000 in supplies and working capital. There was no valuation of the Coast Line's properties made and no estimate of the Coast Line's normal earning capacity (which was the basis by which the debtor's permissible capitalization was fixed), and no attempt to make a fair allocation between the Coast Line's and debtor's owners of the equities in the merged properties. No provision for sharing by the debtor's bondholders in the anticipated unification savings by the debtor's bondholders was made. All real chance of such bondholders for any appreciation lay in their relatively insignificant ownership of Coast Line common stock, to be receved under the merger plan. R., Vol. I, pp. 295-391.

This Third Report of the Commission was reaffirmed upon rehearing—again in a sharply divided six-to-five report, wherein the Commission held (R., Vol. I, pp. 729-59):

(1) That the proposed plan of reorganization was valid and authorized,

(2) That there was provided in the plan "Adequacy of satisfaction of claims of first and refunding bondholders" because

(a) The "probable market value of the securities to be issued in the reorganization" was equal to or slightly more than the current market value of the defaulted First and Refunding bondholders;

(b) Since many of the First and Refunding bondholders purchased their bonds at substantial discounts and will "reap substantial profits," "that the claim will under the approved plan be adequately satisfied is obvious."

The pithy dissenting opinion is printed as an appendix hereto.

(d) Hearing on current certified plan of reorganization of debtor.

This "merger" plan of reorganization was certified by the Commission to the District Court, before which the debtor's reorganization was pending. Seasonable objec-

tions to the "merger" as a plan of reorganization were filed. Such objections came on for hearing before Honorable Samuel H. Sibley, as District Judge Designate, on January 10, 1949. Considerable testimony was offered in support of and in opposition to the fairness and equity of the proposed merger. A new plan of reorganization was proposed by St. Joe Paper Company, the fairness of which was beyond question. New evidence was submitted.

(e) Decision of the District Court disapproving certified plan.

Upon the basis of the record made before it, as well as the record certified by the Commission, the District Court disapproved the certified plan of reorganization upon three grounds:

(1) That the certified plan was illegal;
(2) That the plan was unfair and inequitable and did not afford due recognition to the rights of the bondholders.
(3) That the bondholders of the debtor should not be coerced into acceptance of the certified plan under the "cram-down" provisions of Section 77.

(f) Decision of the Circuit Court of Appeals affirming the decision of the District Court disapproving the certified plan.

Upon appeal by the Coast Line and the 5 per cent Committee, the decision of the District Court was upheld. The prevailing opinions of Judges Hutcheson and Russell concurred in sustaining the District Court's decision upon the grounds that such District Court had properly reviewed the certified plan for fairness and equity and that such Court's conclusion that the certified plan was unfair and inequitable, and did not afford due recognition to the rights of the bondholders was not clearly in error. In fact, Judges Hutcheson and Russell went farther and stated the categorical opinion that the certified plan was unfair and inequitable and did not afford due recognition of the rights of the bondholders, and joined the District Court in remanding the proceedings to the Commission

to formulate a fair and equitable plan of reorganization, just to the bondholders of the debtor.

By their petition to this Court, the petitioners seek to review and reverse those conclusions. It should be observed that this petition joins the Coast Line and its "faithful ally", the five percent committee as petitioners.

SUMMARY OF ARGUMENT

So far as this petition is concerned, and at this juncture of the proceedings, the only issues involved center upon the right of the Petitioners to appeal and upon whether the District Court had the power to review the certified plan in the manner and to the extent expressly provided by subsection (e) of Section 77 in order to determine whether such plan "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders."

It is the position of this respondent that the Petitioners have no appealable interest and that the District Court had the power expressly given him by the statute to review the fairness and equity of the certified plan. Either fact is sufficient to deny the Petition.

ARGUMENT

A. The Petitioners have no appealable interest in the proceedings.

The right of either the Committee or the Coast Line to appeal was seriously assailed in the Circuit Court. That Court chose to pass over such question and to decide the cause on the merits. The right of the Petitioners to appeal remains in dispute on this petition and is denied by this respondent.

It is settled that "a party has an appealable interest only when his property may be diminished, his burdens increased or his rights detrimentally affected by the order sought to be reviewed by the appeal." *In re Michigan-*

Ohio Building Corp. (C.C.A. Ill. 1941) 117 F. (2d) 191, 193.

So far as the petitioner Committee is concerned, it avers in its petition that "its sole interest" in this appeal is to obtain the best possible treatment for the bondholders in whom it is interested. Page 6 of the Petition. But the "sole basis for the affirmance" of the District Court by the Court of Appeals was, as the Petition affirmatively says, its conclusion "that the Plan was not fair and equitable to the bondholders (of the Florida East Coast Railway Company) and does not afford due recognition to the rights of refunding bondholders." Page 15 of the Petition. The Circuit Court upheld the District Court's remand of the proceedings to the Commission in order that "better treatment" might be accorded bondholders (including those in whom the Committee asserts its interest) through the formulation of a new plan which Judge Hutcheson said, would be "really fair and equitable."

The effect of the order appealed from is thus to require the Commission to prepare a new plan of reorganization that will be more favorable to bondholders than the instant certified plan. How can the Committee—if it is genuinely interested in bondholders,—be aggrieved by such an Order?

It is significant that the Committee, which busies itself so about this appeal, has never consulted its *cestuis que trustent,* solicited their approval for its action or obtained a specific authorization for its action in appealing, by its own admission. And the members of the Committee own no bonds of their own.

The only justification for its right of appeal, stated by the Committee in the Petition, is that it "believes it (the certified plan) to be the best available for the many bondholders it represents." Page 6 of the Petition. The Committee does not assert that the certified plan, disapproved by the District and Circuit Courts, is the most favorable plan for bondholders that can be formulated or devised by the Commission. It limits itself to the claim that the certified plan is simply the "best available" (i. e., is the better of the two proposed before the Commission).

To sum up, the Committee has no right of appeal because the result of the orders appealed from will be "better treatment" for bondholders. It cannot be aggrieved because its bondholders will not have any of their rights diminished; such rights can only be improved. The Committee is actually seeking to appeal from a favorable decree. See *Public Service Comm. v. Brashear Lines*, 306 U. S. 204; *In re Schwartz*, 89 F. (2d) 172. Nor is the Committee authorized to file this Petition by any of those who as bondholders have any interest in this proceeding. Accordingly, the "small but faithful ally" of the Coast Line can sustain no right of appeal.

The Coast Line is equally without an appealable interest in this proceeding. On page 1 of the Petition, the Coast Line states its appealable interest in its status as the beneficiary of the proposed merger under the certified plan and as "an unsecured creditor of Florida East Coast Railway Company." Heretofore in this appeal the Coast Line has endeavored to gloss over its character of "unsecured creditor" in order to escape the scope of *Northern Pacific R. Co. v. Boyd*, 228 U. S. 482. To establish an appealable interest, however, it proclaims itself "an unsecured creditor."

But, under the certified plan, the rights of unsecured creditors are not affected. See R., Vol. I, pp. 365-72 and 744. Their rights attach only to certain disputed assets. The certified plan did not determine finally whether the assets were available for unsecured creditors. That issue was left for litigation, which has now been terminated. Whether the certified plan is approved or disapproved cannot affect this issue and the Coast Line cannot be aggrieved as an unsecured creditor by the disapproval of the certified plan, which makes no provision for unsecured creditors.

Nor has the Coast Line any standing as one of the parties to the merger contemplated by the certified plan. The Coast Line is not a bondholder; it is one who seeks to acquire the debtor on its own terms. It has submitted an offer in the form of a proposed merger. That offer has been recommended to the Court in the certified plan.

As Judge Sibley significantly remarked, "The very aggressiveness of the Coast Line in proposing and defending this plan indicates that Coast Line in proposing and defending their plan indicates that Coast Line thinks it is getting a bargain; that what it gets is not the mere equivalent of what it pays, but much more." R., Vol. II, p. —.

It has several times revised its offer to extend more favorable terms to the bondholders. During the hearing before the Examiner upon the Coast Line's proposed plan, the Coast Line modified its plan by offering to pay $3,000,000 in cash. After the Commission required additions to this, the Coast Line eagerly increased its offer. It is an eager bidder, whose bid, upon consideration by the Court, has been rejected by the Court. It has no right of appeal from such rejection. *Harduval v. Merchants & Mechanics' Trust and Savings Bank* (1920), 240 Ala. 187, 86 So. 52; *Spangelo v. North Dakota Ry. Co.* (C.C.A.N.D., 1921), 276 F. 26.

B. Theory of petition is that District Court was without power to review the unfairness of the plan.

If, however, the right of the petitioner to appeal be assumed *arguendo,* the Petition herein is without merit. The theory upon which the Petitioners ask this Court to review the decisions of the lower Courts is, basically, that those Courts erroneously held the same view "as that held by those who, prior to the decisions of this Court in the *Western Pacific* and *Milwaukee* cases, asserted that under Section 77 the Commission and the Court had coordinate jurisdiction to determine whether a plan was fair" (Brief, p. 21) and that such erroneous opinions "will not only substantially veto this Court's opinions in the *Western Pacific, Milwaukee* and *Denver* cases so far as the Fifth Circuit is concerned, but that they will cause confusion and uncertainty in other Circuits." Brief, p. 22.

The Petitioners contend by their petition that the function of the District Court, in reviewing a certified plan of reorganization under Section 77, is strictly limited to de-

termining whether the Interstate Commerce Commission "had failed to follow the statutory mandates or lacked material evidence to support its conclusions." Brief, pp. 21, 26. Beyond that function, the District Court, it is contended by the Petitioners, is vested under the statute with no authority to consider or pass on the fairness and equity of a plan of reorganization certified to it by the Interstate Commerce Commission and, most particularly, it is not permitted to exercise any "independent judgment" thereon. In short, the Court has no greater power over the certified plan of reorganization than the Circuit Court of Appeals has over decisions of the National Labor Relations Board, according to this argument of the Petitioners.

This attack by the Petitioners upon the right of the District Court to review the certified plan for unfairness and inequity presents the sole and exclusive basis for the grant of the writ sought. That was, as we have seen, the ground upon which the majority of the Circuit Court of Appeals concurred in upholding the District Court. If the District Court and the Circuit Court were correct in disapproving such plan on that ground, it is useless to consider the other and additional reasons assigned by the District Court for its disapproval. Those other and additional grounds could be availed of by the appellees upon appeal solely to sustain the decision of the District Court.

But whether correct or not, they will not support an application by the Petitioners for certiorari, for the decision of the lower Courts could be adequately sustained upon the ground asserted by the majority of the Circuit Court of Appeals. The petition herein must stand or fall upon the Petitioners' challenge to the authority of the District Court to disapprove the certified plan for unfairness and inequity, on the record.

The proper application of the "cram-down" provision of Section 77 and the relevancy of the *Old Colony* case to the legality of the certified plan, are accordingly beyond the proper scope of this application and can only become pertinent if the Petitioners have stated a ground for the writ sought on the basis of their contention that the Dis-

trict Court improperly considered the fairness of the certified plan.

C. The Dictrict Court has authority to review a plan of reorganization under Section 77 for fairness and equity.

It were well at the outset of this discussion to set apart the powers of the District Court under Section 77 over determinations of valuation and public interest by the Commission from those dealing with the general fairness and equity of the certified plan. Subsection (e) of Section 77 confers on the District Court no authority to review generally valuations and issues of public interest resolved by the Commission in reorganization proceedings. The rule urged by the Petitioners applies to such judgments of the Commission. Those determinations by the Commission, it is settled, are binding upon the Court if arrived at in accordance with the statutory standards and upon substantial evidence. So much the District Court in this cause clearly recognized. At the very outset of his opinion Judge Sibley said (R., Vol. II, pp. 474-5):

> "I have no function to review the matter of compatibility with the public interest of the plan, or the valuation of the property involved unless on the question of unconstitutional taking of it; but I should independently consider those matters which the statute requires me to be satisfied about."

It may be helpful, also, to ascertain the accepted definition of valuation within the contemplation of the foregoing rule. In its Fourth Report in this proceeding, the Commission said: "Value for reorganization purposes, physical value, and market value, are each entirely different, *and we can concern ourselves only with the first*" (italics added). R., Vol. I, p. 736. The term "value for reorganization purposes" which the Commission has said was the only valuation made by it and with which it could be solely concerned in this proceeding, was given this fixed meaning by the Commission: "In any reorganization 'value for reorganization purposes' simply means 'maxi-

mum permissible capitalization' ". R., Vol. I, p. 735. Accordingly, the "maximum permissible capitalization" of the debtor and the public interest involved in debtor's operations are reviewable by the District Court only for observance of legal standards and for substantial evidence.

But, unlike its provisions with respect to permissible capitalization and public interest, Section 77 is not silent upon the power of the District Court over the fairness and equity of the certified plan. On the contrary, it speaks out with both clarity and directness in what Judge Hutcheson so aptly described as "plain and unambiguous language." The Petitioners themselves conceded in their brief filed in the Circuit Court in this case that the District Court had full power to review the fairness of a certified reorganization plan under the plain language of the statute, for the Coast Line argued at page 173 of its brief in that Court that the District Judge had erred in "concluding that the statutory provisions (giving the District Court authority to review the fairness of the plan) were to be followed as written."

This admission that the plain language of the statute vests the District Court with authority to review the fairness of the certified plan is demanded by the unqualified words of subsection (e) of Section 77. This subsection requires the District Court, preliminary to approval of the certified plan, to satisfy itself that the certified plan "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders and does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders." No support for the appellants' argument is thus to be found in the statute itself. On the contrary, the statute contradicts their argument. So much they admit for, in fact, their argument rests, as we have seen, largely upon the contention that the statute has been construed and is to be construed in contradiction of its plain import.

Actually, the Interstate Commerce Commission assumes for itself none of the broad powers asserted for it by the

Petitioners and seemingly recognizes that the District Court has the authority to review the fairness and equity of a certified plan of reorganization under Section 77. The dissenting opinion filed in connection with the Fourth Report of the Commission herein was written by Commissioner Mahaffie, for years the head of the Finance Division of the Commission, who, along with Commissioner Eastman, sponsored the enactment of the railroad reorganization statutes (often spoken of as the "Mahaffie Acts"). In that dissenting opinion, filed on behalf of five members of the Commission, Commissioner Mahaffie said (R., Vol. I, p. 747): "It should be remembered that the 'fair and equitable' finding is required to be made not only by us but also by the court." Beyond question, this quotation shows that Commissioner Mahaffie and those commissioners joining with him recognized that the District Court had full "concurrent" power to review the certified plan for fairness and equity, and had the right to exercise an independent judgment on such issues. To that statement by Commissioner Mahaffie, the majority opinion of the Commission took no exception. It seems fair to assume then that it accepted Commissioner Mahaffie's construction of the District Court's power.

Nor can the appellants justify their proposed construction of the statute by reference to the legislative history. The legislative history of Section 77, as it deals with the respective functions of the Commission and the Courts in reviewing plans of reorganization thereunder, was carefully detailed by Mr. Justice Reed in his able opinion in *Ecker v. Western Pacific Ry. Co.*, 318 U. S. 448, at pages 469 to 475, inclusive. Preleminarily, he marked out the restrictions under the District Court's jurisdiction over the Commission's determinations of permissible capitalization and public interest. He then passed on to the District Court's power under the language of subsection (e) to review the equity of a certified plan. After referring to the failure of the House in its 1933 version of Section 77 to include a provision for judicial review of the fairness and equity of plans of reorganization, Mr. Justice Reed emphasized the subsequent Senate amendment endowing the

Courts with a "concurrent" right with the Commission to review independently the fairness and equity of the plan of reorganization, saying (p. 470):

> "These amendments giving *concurrent power to the Court* were adopted by the Senate and accepted by the House and the bill became the Act of March 3, 1933, 47 Stat. 1475." (Italics added.)

Mr. Justice Reed then turned to the amendments of 1935 and put the matter thus (p. 471):

> "While the most important amendment was to furnish means to avoid the obstruction of dissatisfied classes of creditors or stockholders by making a fair and equitable plan effective over dissenters, the requirements of coordinated action by Commission and Court was retained."

This legislative history, so painstakingly reviewed by Mr. Justice Reed, shows that it was the plain purpose of the Congress that the District Court should have the power of independent review of the fairness and equity of the certified plan under Section 77.

Nor do the decisions in the *Western Pacific* (318 U. S. 448) or the *Milwaukee* cases (318 U. S. 523), upon which the appellants wholly rely, violate this legislative history or the "clear and unambiguous language" of the statute or Commissioner Mahaffie's administrative interpretation with respect to the power of the District Court to review the fairness of the certified plan.

In the *Western Pacific* case, the District Court, after remarking on the limited right of review exercised by the District Court in that reorganization over the "permissible capitalization" of the debtor and over public interest fixed by the Commission, said (p. 467, 318 U. S.):

> "*Upon the other findings of the Commission, the District Court exercised an independent judgment* based upon the record and the findings of the Commission, together with additional evidence produced before the Court by the parties." (Italics added.)

The action of the District Court in exercising in that case "an independent judgment upon all" findings of the Commission other than those of valuation and public interest was thus approved by this Court in the *Western Pacific* case, as shown by the quoted sentence. The *Western Pacific* case represents an unqualified approval of the right of the District Court to review independently the conclusions of the Commission on the fairness of a certified plan of reorganization. That was just what the lower Courts did in this case. It cannot, then, be said fairly that the decisions of the lower Courts in this case "veto" or violate the conclusions reached by the Court in the *Western Pacific* case.

That the decisions of the District Court in this case conformed with the rule announced in the *Western Pacific* case is similarly established by reference to the District Court's opinion in the *Western Pacific* case, which was approved by the Supreme Court. There the District Court summed up the respective functions of Court and Commission in these words (34 F. Supp. 493 at p. 504):

> "The two issues of (1) amount and character of capitalization and (2) distribution of new securities are closely related. The determination of the amount and character of the capitalization (a legislative function affecting the public interest) is exclusively within the province of the Commission. The only qualification, if any, is that the Court shall independently determine whether, in the exercise of its jurisdiction, the Commission has acted fairly, within the bounds of the Constitution and not arbitrarily. The determination of the questions relating to the distribution of the new securities, including legal priorities and allocations, involves private rights and is a judicial function, within the province of the court. . . . While the decision of the Commission in the premises is advisory only, it was of inestimable value to the Court in enabling it to see the whole picture and arrive at a decision."

To summarize, this District Court decision, which was upheld by this Court, held that the permissible capitalizaton of the debtor, and the public interest, were within

the special province of the Commission, to be reviewed by the Court for want of material evidence or failure to observe the statutory standards, but in all other fields, such as the equitable equivalence of the securities offered,—in short, the balancing of all "private rights" along lines of fairness and equity in the allocation of securities,—the findings of the Commission are "only advisory" to the Court, which should and will exercise its independent judgment.

The *Milwaukee* case with equal clearness supports the conclusion reached by Judge Sibley on his jurisdiction to exercise an "independent judgment" on the fairness and equity of the certified plan. In that case, Mr. Justice Douglas, after an extensive independent review of the adequacy of the treatment of the general mortgage bondholders—in large part, one of the basic issues presented to Judge Sibley in this case—, remanded the cause to the District Court, saying (p. 571, 318 U. S.):

> "*The Commission and the District Court should determine* what the general mortgage bonds should receive in addition to a face amount of inferior securities equal to the face amount of their old ones, as equitable compensation, qualitative or quantitative, for the loss of their senior rights." (Italics added.)

In determining the adequacy of a creditor's treatment, "equitable equivalence" and like questions, it will be noted that the Court "brigaded" (*Palmer v. Mass.*, 308 U. S. 79 at p. 87) the Commission and District Court, treating them as having "concurrent" and "coordinate" jurisdiction, charged, each obedient to its own procedure and in accord with its own judgment, to pass on the issue. Certainly this language from the *Milwaukee* case does not indicate that the role of the Court under Section 77 in dealing with the fairness and equity of a certified plan is that of a "rubber stamp" any more than it is that of "a ministerial register of the vote of the several classes of security holders" under old Section 77b. See *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106 at p. 114. It clearly shows that the District Court is expected to exer-

cise an "independent judgment" on the fairness and equity of the certified plan.

The Petitioners, in their brief, quote from Mr. Justice Douglas' opinion in this *Milwaukee* case. P. 17, Petitioners' Brief. The point of such quotation for their argument is not clear. If the purpose was to throw light on the judicial functions in railroad reorganization, it is singular that Petitioners omitted the succeeding sentences which dealt specifically with this question. To fill out the quotation, Mr. Justice Douglas said at pages 565-6, 318 U. S.:

> "It is sufficient that each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered. That requires a comparison of the new securities allotted to him with the old securities which he exchanges to determine whether the new are the equitable equivalent of the old. But that determination cannot be made by the use of any mathematical formula. *Whether in a given case senior creditors have been made whole or received 'full compensatory treatment' rests in the informed judgment of the Commission and the District Court on consideration of all relevant facts.*" (Italics added.)

The *Milwaukee* case as the above quotation so clearly shows, contemplates that the Court, equally with the Commission, shall exercise an independent and coordinate jurisdiction to determine the fairness and equity of the certified plan and to determine whether bondholders have received "full compensatory treatment." The decisions of the lower Courts in this proceeding followed with exactitude that rule.

That this construction of the *Western Pacific* and *Milwaukee* cases, which we have outlined, is the proper one seems settled by the language of this Court in *Comstock v. Group of Investors,* 335 U. S., 211, where Mr. Justice Jackson, speaking for a majority of the Court, said (pp. 226-7):

> "We think that, in the reorganization proceedings,

the courts may entertain on their merits objections to a plan even if made by one who might be barred from asserting a cause of action in his own behalf, if the subject-matter of the objections is such that it goes beyond the objector's individual interests and affects the fairness and equity of the plan. . . .

"In view of the functions cast upon the court in such cases, we cannot say that it may not, in its discretion, consider objections on their merits even though they have not been presented to the Commission. Some circumstances might be disclosed to indicate a remand for their consideration by the Commission. They might indicate that the courts would withhold approval, not out of deference to the objecting parties' rights but because of the broad responsibilities laid upon the court for the equity and fairness of the plan as a whole."

Re Chicago, R. I. & Pac. Ry. Co. (D. C. Ill., 1943) 50 F. Supp. 835, represents an application of the rules enumerated in the *Western Pacific* and *Milwaukee* cases on the respective powers of Commission and Court. Leading counsel for the Coast Line represented the Protective Committee for the general mortgage bonds of the debtor in that case. He vigorously assailed the Commission's finding that the bondholders represented by him were receiving "full satisfaction" under the certified plan. See page 855, 50 F. Supp. He asked the Court, in the exercise of its independent judgment, "to determine whether the senior issue has received 'full compensatory treatment'." Page 856, 50 F. Supp. And the Court accepted counsel's construction of its powers, observing, "Assuming this statement to be a specific finding of full satisfaction, or full compensatory treatment, *it remains for the court to determine whether the Commission was correct on this point.*" Page 856, 50 F. Supp.

And the Court proceeded to find that there was not "full satisfaction," "equitable equivalence," "full compensatory treatment," because, while the senior creditors were given securities of the par value of their full debt with interest, the actual value of such securities was less

than the full amount of their debt with interest and junior creditors could not accordingly take. Page 856, 50 F. Supp.

In reality, the Petitioners acted, during the proceedings before the District Court, upon the assumption that the District Court was charged with an independent responsibility for the fairness and equity of the certified plan. They did not assume that the District Court was precluded from inquiring into such fairness by the conclusions of the Commission. They called as a witness before the District Judge, Mr. Stott, a statistical employee of J. P. Morgan & Company, filling in as the "acting Secretary" of the petitioner Committee. Mr. Stott restated the estimate of income return from the securities to be distributed among the debtor's bondholders under the certified plan incorporated in the report of the Commission and, on the basis of such estimates, gave his reasons for concluding that the certified plan was fair and equitable. If the District Court had no right to review the fairness and equity of the certified plan, why did the petitioners call Mr. Stott as a witness and offer his testimony on the fairness of such plan?

And, as Judge Sibley sagely remarked, for that matter, why would the Act permit the District Court to receive such evidence as that of Mr. Stott, if that Act did not intend that the District Court should review the fairness of the plan?

Counsel for the Petitioners seeks to gather authority for their position from this single sentence, detached from its context, in the first opinion in the *Denver and Rio Grande Reorganization*, 328 U. S. 495 at p. 509:

> "To the courts, Congress confided the power to review the plan to determine whether the Commission has followed the statutory mandates of subsection (e) 318 U. S. at page 477, 63 S. Ct. page 709, 87 L. Ed. 892, and whether the Commission had material evidence to support its conclusions. 318 U. S. at page 477, concurring opinion at page 512, 63 S. Ct. at page 709, concurring opinion at 725, 87 L. Ed. 892."

This quoted language, as the citation set forth therein evidences, dealt with the Court's power in connection with

the valuation, i. e., permissible capitalization, of the debtor's property. Page 477 of 318 U. S., to which the quoted excerpt refers, is restricted to a discussion of the reviewability of the valuation of the debtor made by the Commission. In fact, it is headed, "Method of Valuation." The Court's discussion of the respective powers of Commission and Courts, on the other hand, appears on pages 471-4 of the cited opinion. This quotation is without application to the District Court's power to review a plan for fairness and equity; it is limited to the problem of valuation or permissible capitalization.

Petitioners, also, would bulwark their argument with *Securities and Exchange Commission v. Central Illinois Securities Corp.*, 69 S. Ct. 1377. It must be noted that the issue of reviewability of administrative determinations under the Public Utility Holding Company Act of 1935 in this case turned upon the clear conflict between the scope of judicial review provided in the case of voluntary plans submitted by the holding company and that authorized for plans imposed by the Commission. In the latter case the reviewing court was bound by all factual findings by the Commission, if supported by material evidence; in the former case no such limit on judicial power was expressly included in the statute. The determination made by the Commission, around which the appeal revolved, dealt with valuations. The lower Court set aside such valuations, assuming that since this was a plan submitted by the holding company, it had the power to reverse the Commission conclusions for "colloquial equities."

What the Court held was that the two provisions for review under the Act—both the one covering voluntary and involuntary plans—were to be harmonized and that both reviews should be subject to the same limitations, a ruling which meant that the valuations made by the Commission, if supported by material evidence, were binding upon the reviewing court. Such a ruling the Court held was not an unusual conclusion and instanced, in support of such statement, the rule in the *Western Pacific* case, saying (Page 1393, 69 S. Ct.):

"The Commission's findings as to valuation, which

> are based upon judgment and prediction, as well as upon 'facts', like the valuation findings of the Interstate Commerce Commission in reorganization under 877 of the Bankruptcy Act, *Ecker v. Western Pacific R. R. Corp., supra,* are not subject to reexamination by the court unless they are not supported by substantial evidence or were not arrived at 'in accordance with legal standards'."

And the language of the Court on "colloquial equities" is (p. 1406, 69 S. Ct.):

> "In deciding the case on the assumption that 'the inquiry is one of relative rights based on colloquial equity' and that the Otis case accorded participation to security holders in accordance with the standard of colloquial equity, the District Court erred insofar as by 'colloquial equity' it meant considerations which do not bear upon the investment or going-concern value the preferred would have absent the liquidation compelled by the Act."

It is clear from the foregoing that the Court did not disapprove of "colloquial equities" generally; it disapproved as irrelevant to the particular inquiry the specific "colloquial equities" envisaged by the lower Courts. This case dealt with a problem of statutory construction; it was not concerned with the broad range of judicial power imposed by subsection (e) of Section 77.

To summarize the conclusions of the cases reviewed, the powers of Commission and Court, in reviewing plans of reorganization under Section 77, are:

> (1) In the fields of public interest and valuation, the Commission acts independently of the Courts, which have power only to review as to such determinations for failure to follow legal standards and for absence of material evidence. As the Court said at page 473, 318 U. S.: "None of the findings required of the judge under subsection (e) relate specifically to valuation," and we may add, public interest.
>
> (2) In all other fields, including the broad equity and fairness of the plan as a whole, the Courts have, by

> express delegation under subsection (e) of the Act, "coordinate" and "concurrent" jurisdiction with the Commission, though, "As to these," the powers of the Court "are negative. It may veto the plan in its entirety but may improve it only by suggestion. It becomes a necessary and important factor in railroad reorganization. These reorganizations may be attained only through properly coordinated action between the Commission and the Court." 318 U. S. 474-5.

It follows from the foregoing rules that the District Court had both the power and the duty to determine the fairness and equity of the certified plan and whether such plan afforded due recognition to the rights of the bondholders. It had before it concededly an ample record on which to base such determinations. It so determined the issues adversely to the certified plan. Its decision was both approved and reaffirmed upon appeal to the Circuit Court, which held that the certified plan was not fair and equitable and did not afford due recognition to the rights of the bondholders. Such determination, so upheld by the Circuit Court, should not be disturbed by this Court. In the *Milwaukee Case* (318 U. S. 523 at p. 564) Mr. Justice Douglas said:

> "But we are not performing the functions of the District Court under S. 77 (e). Our role on review is a limited one. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end."

This issue of the fairness and equity of the certified plan is one of fact. Such issue has been resolved by unequivocal concurrent findings of fact by the two lower Courts. That concurrent determination will not ordinarily be disturbed. As this Court said in *Geddes v. Anaconda Copper Mining Co.* 254 U. S. 590:

> "With this conclusion we agree, applying the settled rule of this Court that in suits in equity concurrent findings by two courts on a question of fact will be

accepted unless it be clear that their conclusion is erroneous."

The Petitioners do not argue that the District Court did not have a factual basis for its determination; it rested its petition upon the legal ground that the District Court was without power to review the fairness and equity of the certified plan. It is thus conceded that there is warrant in the record for the District Court's determination. Accordingly, to use the language of Mr. Justice Douglas, the task of this Court "on review is at an end" and the petitions should be denied.

Respectfully submitted,

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March, 1950.

APPENDIX A

The dissenting opinion as to the Fourth Report of the Interstate Commerce Commission is as follows (R., Vol. I, pp. 745-7):

> "Here the Atlantic Coast Line is an applicant seeking to acquire the railroad property being reorganized. It is certainly in no more favored position than would be the holder of a junior claim or a stockholder. The creditors under the plan now approved receive much less 'in value than the face of their claims.' The report relies on the theory that the creditors are entitled to receive only the equivalent of the face amount of reorganization securities as fixed by us, which equivalent may be, and in this instance is, very much less in market value than either the face of the claims or the value of the property for reorganization purposes as found by this Commission. The latter figure is $40,500,000. This is based on the Commission's estimate of normal future earnings and is sometimes described as the capitalizable value of the property. The effect of the finding is that securities of that total amount may properly be issued in the reorganization. The report attributes to the Coast Line securities to be paid for the property a value of approximately $31,000,000. The question presented is whether the persons who normally would be entitled to receive the $40,500,000 of securities found by us to be properly issuable, and the resulting control of the property, may be required to give up that control and to accept instead Atlantic Coast Line securities having a value much less than that amount. On this point the holding of the Supreme Court in the Boyd case, supra, is of interest:
>
> > 'If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the sotckholders could retain it for any purpose whatever.' (Page 508.)

The Boyd principle is the authoritative test of what is fair and equitable. It is difficult to see how it can be subordinated, as seems to be done in the report, to the Commission's finding of what is required by the public interest. *It should be remembered that the 'fair and equitable' finding is required to be made not only by us but also by the Court.* Apparently to buttress the public interest finding the report adopts a novel theory as to what treatment legally satisfies a prior claim. After discussing at some length the prices paid by some of the security holders for some of their holdings and their possible profits on such holdings, the conclusion is reached that 'the preponderance of the creditors, instead of suffering losses, will reap substantial profits.' It is then found 'That the claim of the First and Refunding bondholders will, under the approved plan, be adequately satisfied is obvious.' This remarkable finding seems to be based on an appendix attached to the summary of the argument of counsel for the Coast Line. It is not of record in this proceeding. And even if the facts stated in it were proven they would not afford a valid basis for the finding above set out." (Italics added.)

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No. 601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

ATLANTIC COAST LINE RAILROAD COMPANY and the DEPOSIT COMMITTEE for First and Refunding Mortgage 5% Bonds of Florida East Coast Railway Company due 1974,

Petitioners,

vs.

ST. JOE PAPER COMPANY, ET AL.,

Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The four respondents' briefs help to emphasize the importance of the questions presented by the petition, all of which are interrelated and but facets of a single question: How is the primary power in a Section 77 proceeding, to determine what a plan of reorganization shall provide, distributed among the Commission, the Courts and the security holders?

Although a series of decisions by this Court had sharply defined the distribution of power under Section 77 to determine what a plan of reorganization shall provide and had thus dissipated the fog of uncertainty which overhung Section 77 proceedings as a result of conflicting interpretations of that Section, the majority of the Court below undertook to redistribute that power and, by according to the District Court a broad and undefined discretion to determine "the broad equity and fairness"[1] of

[1] Brief of St. Joe Paper Company, p. 27.

a plan, construed Section 77 in such a way as to introduce into the reorganization machinery that very division of authority, with the attendant confusion, uncertainty, delay and risk of collision, which this Court found that the Congress had not intended.

It will not do to say, as the Conn group says (p. 13-14), that this question is not of great importance because there are only 29 pending railroad reorganizations or to conjecture that "before another crop of railroad reorganizations appear before the courts, it seems probable that the statute may be significantly changed." The conduct of 29 railroad reorganization proceedings is of public importance and there is no present move to change Section 77.

In view of the paramount importance of the dominant question which we have thus summarized, it is unnecessary to try to correct the many statements in the respondents' briefs which we deem clearly erroneous and unsupported either by the record or by anything in the opinions on which the respondents rely. Nor is it necessary to reply at this time to the miscellany of arguments on the merits of the case.

The Powers of the Commission and the Courts

This Court held in the *Western Pacific* case (318 U. S. p. 472)[2] that the "function of valuation" which is "left to the Commission is the determination of the worth of the property valued, whether stated in dollars, in securities or otherwise." The Commission made a finding of valuation, stated in dollars and Atlantic Coast Line securities, in the precise language of this Court's opinion in the *Milwaukee* case (318 U. S. 565-566),[3] that what the bondholders would receive would be "the equitable equivalent of the rights of these creditors in and to the property of the debtor" (267 I. C. C. 379).

[2] For fuller quotation see p. 17 of the petition for certiorari.

[3] For fuller quotation see p. 17 of the petition for certiorari.

The Courts below did not find that the Commission had failed to follow the statutory mandates or lacked material evidence to support its findings. Under the opinions of this Court which are summarized in the petition for certiorari the finding that the bondholders would receive "the equitable equivalent of the rights" which they would surrender was therefore conclusive.

The respondents, citing the majority opinions below, would circumvent the scheme of Section 77 and obliterate the division of authority between the Commission and the District Court. In their view, even though the Commission, which has the "leadership" (*Western Pacific* case, 318 U. S. p. 468), has properly discharged every statutory responsibility with respect to all components of a plan—public interest, valuation and distribution of securities—the plan may nevertheless be destroyed by an exercise of the Court's unfettered and independent judgment as to "the broad equity and fairness" of the plan.[4]

Specifically, the respondents take the position that as to "the equitable equivalence of the securities offered,—in short, the balancing of all 'private rights' along lines of fairness and equity in the allocation of securities,—the findings of the Commission are 'only advisory' to the Court, which should and will exercise its independent judgment."[5]

How do the respondents reach these conclusions, and what would be the consequences if the majority decision of the Court of Appeals so construing Section 77 should stand?

The respondents acknowledge that a valuation by the Commission is binding on the Court if made in conformity with the statutory mandates and supported by material evidence; the Mortgage Trustees aptly refer (p. 10-11) to

[4] Brief of St. Joe Paper Company, p. 27. See also Brief of Lynch interests, p. 16, and Brief of Conn group, p. 5.

[5] Brief of St. Joe Paper Company, p. 22.

"the Commission's essentially business evaluations of the worth of the Florida East Coast Railway". But, while professing to acknowledge that the Court should defer to such an essentially business evaluation, the respondents undertake to strip it of any significance. For they devote the greater part of their briefs to assertions that the consideration to be provided for the Debtor's properties under the Plan is inadequate.

At the same time they treat the requirement that a Court find that a plan is "fair and equitable" as authorizing the Court to exercise an "independent judgment" in determining whether the total consideration provided for a property is adequate. They do this by asserting that a question of "the absolute priority rule" was presented in this case,[6] even though there was no issue as to the respective treatment of a senior class and a junior class and none of the four Judges below mentioned the absolute priority rule. If this were the correct construction of Section 77, any question as to the adequacy of the consideration provided for in any plan for either all or any part of a debtor's property would present a question whether the plan was "fair and equitable" and the District Court would have the power and duty to decide independently as to the adequacy of the consideration.

In most reorganizations there are several classes of bondholders, each of whom is called upon to surrender a lien on a particular property in exchange for a smaller interest in an aggregation of properties, represented by securities which have been determined by the Commission to be the "equitable equivalent" of the rights which the bondholders surrender. This will appear from the tables in this Court's opinion in the *Denver* case (328 U. S. p. 502-503), from the opinion of the Court of Appeals for the Seventh Circuit in *Chicago R. I. & P. Ry. Co.* v.

[6] Brief of Conn group, p. 10.

Fleming (1946) 157 F. (2d) 241, at p. 247, and from even the most cursory examination of Commission-approved plans. The exchanges provided for in plans to which the respondents refer as "the allocation of securities'" present the most numerous, the most important and the most difficult questions of "broad equity and fairness" in railroad reorganizations. As to all those questions, the respondents support the view of the majority of the Court of Appeals that the District Court has the power and the duty to make determinations in the exercise of its "independent judgment" after receiving such evidence as it may see fit, whether or not such evidence was before the Commission.

Thus the respondents would adopt the "shuttle system" construction of Section 77. That was the name given to the construction of Section 77 advanced by some before this Court's opinions in the *Western Pacific* and *Milwaukee* cases, under which a plan would be shuttled back and forth between the Commission and the Courts until both agreed as to what was fitting and suitable under all the circumstances.

There can be no better illustration of the chaotic consequences of such an interpretation of Section 77 than is to be found in this case. The St. Joe Paper Company argues (p. 13) that the "effect of the order appealed from is thus to require the Commission to prepare a new plan of reorganization that will be more favorable to the bondholders than the instant certified plan." Yet none of the judicial opinions favoring a remand of the Plan contains the slightest suggestion as to how the Commission should go about preparing a "more favorable" plan—in what respects the present Plan is not favorable enough or in what respects and to what extent the treatment of the bondholders should be improved. The Commission having

[1] Brief of St. Joe Paper Company, p. 22.

determined that the present Plan is "fair and equitable", how can it tell what plan would appeal to Judge HUTCHESON as "really fair and equitable" (R. 948)? And it is absurd for the St. Joe Paper Company to assert (p. 13-14) that the outcome of a remand and ultimate action by the Commission a year or two hence, based on the record then available to the Commission, is certain to be a plan more favorable to the bondholders.

The Materiality of Opposition of Bondholders

As pointed out in the petition for certiorari (p. 26-28), Judge SIBLEY and Judge RUSSELL considered the opposition of the St. Joe Paper Company, the Claughton group, the Conn group and the Lynch interests fatal to the Plan. Judge HUTCHESON discounted the opposition of the St. Joe Paper Company and laid primary emphasis on the opposition of the Claughton group, the Conn group and the Lynch interests.

Having assumed a power to determine "the broad equity and fairness of the plan", those three Judges in effect delegated the power so assumed, either completely or in large measure, to a small number of opposing bondholders. As pointed out in the petition for certiorari (p. 26-28), all of the bondholders were entitled to have the Commission's determinations based on the record before it and upon its expert judgment, and, such determinations having been made in conformity with the statutory standards and with the support of material evidence, they should have been sustained.

Judge HUTCHESON's primary reliance on the opposition of the Claughton group, the Conn group and the Lynch interests as a basis for a remand of the Plan, pointedly illustrates one of the reasons why Judge HOLMES' criticism of the majority below (R. 952) was sound. The Claughton group has not opposed the petition for certiorari and there

is no basis for an assumption that it still holds any Bonds or, if it does, that it still opposes the Plan. This development suggests one good reason why there is "no provision of law for the court or judge to submit the plan to the creditors and to give any consideration before the vote is taken as to how the creditors will vote on it."

Changed Conditions

The brief of the Lynch interests, who have taken the lead in contending that there have been so-called "changed conditions", brings out clearly (p. 12-14) that, as stated in the petition for certiorari, the Judge Designate and the majority of the Court of Appeals made no distinction between

(1) evidence before the Commission;

(2) evidence relating to the period prior to March 25, 1948, which could have been, but was not, before the Commission; and

(3) evidence relating to the period subsequent to March 25, 1948.

The argument of the Lynch interests based on so-called "changed conditions" is really that the Court was empowered to decide whether the Commission correctly appraised the significance of any changes in conditions which took place from time to time over a period of years prior to the closing of the record before the Commission. It is simply a variation of the proposition for which all the respondents contend: that a District Court has a virtually unfettered "discretionary" authority to disapprove a Commission-approved plan if the Court believes that a class of creditors has not been suitably treated under the plan and in that connection the Court should form an "independent judgment" with respect to any matters which it deems relevant.

The contentions of the Lynch interests (p. 12) that the Commission "refused to reopen the record to receive evidence of permanently changed post-war conditions" and that the record did "not contain any evidence as to post-war conditions" were advanced in the Court of Appeals, but were demolished. The Commission's Report of March 25, 1948 shows on its face that it had and considered the most significant evidence of post-war conditions, i.e., the earnings records (267 I. C. C. 738-740).

The Contentions of the St. Joe Paper Company That the Petitioners Have No Appealable Interest

The St. Joe Paper Company contended in the Court of Appeals that the petitioners have no appealable interest and such contentions are now advanced in opposition to the petition for certiorari (p. 12-15). The contentions presented by the St. Joe Paper Company in the Court of Appeals were fully discussed in the briefs and they were so clearly insubstantial that none of the opinions of the Judges of the Court of Appeals mentions them. Those now advanced are equally without substance.

CONCLUSION

It is a matter of public importance in the administration of Section 77 proceedings that the conflict between the conclusions of a majority of the Court of Appeals and the decisions of this Court—a conflict sharply illuminated by the dissenting opinion of Judge HOLMES—be resolved.

If these proceedings were to be remanded to the Commission and the Commission were required to proceed in accordance with the opinions of the Judges who favor a remand, the will of Congress as set forth in Section 77 would be defeated and prolonged confusion, with respect to the reorganization of a Debtor which has already been in the hands of the Court for more than 18 years, would ensue.

It is respectfully submitted that the writ should be granted.

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